TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 131

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS AND AGENT OF THE PRESIDENT UNDER TRANSPORTATION ACT, 1920, PETITIONER,

vs.

EDWARD GOODYEAR, AS ADMINISTRATOR OF THE ESTATE OF LEWIS GOODYEAR, DECEASED

[redacted]

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

[redacted]

[redacted]

(32,229)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 662

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS AND AGENT OF THE PRESIDENT UNDER TRANSPORTATION ACT, 1920, PETITIONER,

vs.

EDWARD GOODYEAR, AS ADMINISTRATOR OF THE ESTATE OF LEWIS GOODYEAR, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

INDEX

	Page
Proceedings in supreme court of Kansas	a
Caption [omitted in printing]	a
Appellant's abstract of record from district court of Republic County	1
Statement	1
Petition	2
Answer	11
Exhibit A—General release	15
Amended reply	17
Defendant's requested instructions to jury	20
Court's instructions to jury	25
Court's special questions submitted to jury	42
Verdict	44
Motions for judgment	45
Motion for new trial	46
Judgment	49
Notice of appeal	51
Specifications of error	52
Appendix to abstract	57
Appellee's abstract of record	57
Statement	57
Plaintiff's requested instructions to jury	58
Motion to set aside findings of jury	61

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 18, 1927

	Page
Motions for new trial	62
Defendant's Exhibit 7—Statement of Lewis Gooslyear	63
Testimony of D. L. Machamer	65
A. G. Emerick	66
Howard Towle	68
Bert Ainsworth	68
Ferdinand Hallock	69
Mary Gooslyear	69
Esther Gooslyear	69
Mrs. Charlie Gooslyear	70
Lewis Gooslyear	70
Stipulation as to certain facts	71
Testimony of Fred Blecha	71
Louisa Gooslyear	72
C. M. McMullan	73
Harold Rissler	73
Charles Gooslyear	73
Lloyd Johnson	73
Mrs. John Lindquist	73
R. H. Mumford	74
Anna Webb	77
Dr. W. I. McFarland	77
Vern L. Jones	78
Lewis Vanoss	79
Dr. H. D. Thomas	79
B. H. Stiers	80
Motion for new trial	81
Offers in evidence	81
Specifications of error	81
Appellant's abstract on cross-appeal	86
Statement	86
Testimony of Dr. A. R. Mitchell	87
Offer of proof	89
Affidavit of A. R. Mitchell	90
Testimony of Albert Lynch	92
Offer of proof	94
Testimony of N. C. Rust	94
B. H. Stiers	97
Dr. H. D. Thomas	100
Dr. Mitchell	100
Specifications of error	102
Order substituting Andrew W. Mellon as Director General	103
Argument and submission	(omitted in printing)
Judgment	103
Opinion, Hopkins, J.	103
Petition for stay of mandate	113
Order of stay	113
Minute entry of order denying petition for rehearing	113
Petition for rehearing	(omitted in printing)
Order of substitution	116
Clerk's certificate	(omitted in printing)
Order allowing certiorari	116

In the Supreme Court of the State of Kansas

No. 26347

LOUISA GOODYEAR, as Administratrix of the Estate of Lewis Goodyear, Deceased, Appellee,

vs.

JAMES C. DAVIS, Director General of Railroads as Agent, Appellant.

Abstract and Brief of Appellant.

ABSTRACT

On April 19, 1921, appellee filed her petition setting out two causes of action, the first under the Federal Employers' Liability Act, and the second an alternative cause of action under the Kansas Workmen's Compensation Act. No evidence was introduced under the second cause of action and a demurrer was sustained thereto. It was further stipulated that the case came under the Federal Act, and

it was tried on the first cause of action of the petition, which, omitting formal parts, is as follows:

PETITION

Plaintiff for her first count of her First Cause of Action against the above named defendant alleges:

1. That she is a resident of the City of Belleville, in the County of Republic, in the State of Kansas; that she is now the duly appointed, qualified and acting Administratrix of the estate of Lewis Goodyear, late of the City of Belleville, in the County of Republic, in the State of Kansas, deceased; that she was appointed as such Administratrix on the 8th day of January, A. D. 1921, by the Probate Court of the County of Republic in the State of Kansas; that she took and subscribed to the oath required by law in such matters on the 8th day of January, A. D. 1921, and thereafter on the 10th day of January, 1921, she filed her bond in the said Probate Court as required by law and the order of the said Probate Court and the said bond was on said date approved by the said Probate Court.

2. That during all of the year 1919, the operation, possession, use and control of the railway lines and transportation system of the Chicago, Rock Island & Pacific Railway Company was under Federal control pursuant to Acts of Congress, and pursuant to the proclamations of the President of the United Sates of America and pursuant to the orders of the Director General of Railroads; that during all of said time the said railway lines and transportation system of the said Railway Company were being used, operated and controlled by one Walker D. Hines, as Director General of Railroads in accordance with said Acts of Congress, the proclamations of the President of the United States, and order of Director General

of Railroads; that said railway lines and transportation system of the said Railway Company had been operated by said Railway Company as a common carrier by railroad of freight, passenger and other traffic for several years prior to the use, operation and control of the same by the Director General of Railroads, and continued to be operated and used by the said Director General of Railroads, as such common carrier by railroads, during all of the time covered by said Federal control above set forth; that said railway lines and transportation system of the said Chicago, Rock Island & Pacific Railway Company, at all times herein alleged, extended through and across the states of Illinois, Iowa, Nebraska, Kansas, Colorado and other states; that pursuant to an Act of Congress approved on the 28th day of February, A. D. 1920, known as the "Transportation Act, 1920" the said Federal control of the said railway lines and transportation system of the said Railway Company was terminated and brought to a close; that pursuant to the provisions of the said "Transportation Act, 1920", The President of the United States of America did, on or about the 26th day of March, 1921, designate and appoint James C. Davis, Director General of Railroads, as agent against whom causes of action arising under said Federal control may be brought and maintained; that prior to the 22nd day of March, 1920, and subsequent to the enactment of the "Transportation Act, 1920" The Chicago, Rock Island & Pacific Railway Company did contract with the said agent appointed and designated by the President of the United States of America for the conduct of litigation arising out of the operation of the railway lines and transportation system of the said Chicago, Rock Island & Pacific Railway Company during the use, operation and control of the same under the provisions of the aforesaid "Federal Control Act" pursuant to and in accordance with the provisions of the said "Transportation Act, 1920"; that

said agent did, pursuant to said Act, cause to be filed in the office of the Clerk of the District Court of the United States for the District of Kansas, a statement naming The Chicago, Rock Island & Pacific Railway Company as one of the carriers, among others, with whom he had contracted for the conduct of litigation arising out of the operation, use and control of the said Railway Company's lines and transportation system during Federal control.

3 Plaintiff further alleges that for a number of years immediately preceding the use and operation of the railway lines and transportation system of The Chicago, Rock Island & Pacific Railway Company under the said Federal control, the above named Lewis Gosslyear, now deceased, of whose estate this plaintiff is the Administratrix as hereinbefore alleged, was employed by the said Chicago, Rock Island & Pacific Railway Company as a car and train inspector in and about the yards, tracks and right of way of the said Railway Company at the City of Belleville in the County of Republic in the State of Kansas; that as such car and train inspector it was the duty of the said Lewis Gosslyear to go upon the right of way, across and along the tracks and about the yards of the said Chicago, Rock Island & Pacific Railway Company at the City of Belleville in the County of Republic in the State of Kansas, for the purpose of inspecting and repairing any and all cars and equipment on all incoming and outgoing freight and passenger trains which arrived at, or departed from the said City of Belleville, Kansas, upon the said railway lines and transportation system of the said Railway Company during the hours of service and employment of the said Lewis Gosslyear, and for the performance of such other duties as devolved upon him in the course of his employment; that said employment continued, and said services were rendered by the said Lewis Gosslyear on the said rail-

way lines and transportation system as above alleged, during all of the time that the said railway lines and transportation system of the said Railway Company were under the control, operation, use and possession of the Director General of Railways; that the said Lewis Goodyear was employed as hereinbefore alleged by the Director General of Railroads, at the time of the injuries sustained and suffered by the said Lewis Goodyear as is hereinafter more fully set forth.

4 Plaintiff further alleges that on the 31st day of July, 1919, while the said railway lines and transportation system of the said Chicago, Rock Island & Pacific Railway Company was under Federal control as hereinbefore alleged, and while said railway lines and transportation system were being used, operated and controlled by Walker D. Hines as Director General of Railroads under the said Federal control the said Lewis Goodyear was employed as a car and train inspector as above alleged; that as a part of the said employment it became the duty of the said Lewis Goodyear to go upon the right of way, across and along the tracks and about the yards of the said Railway Company while used, operated and controlled by the Director General of Railroads under Federal control, for the purpose of inspecting and repairing the equipment of freight and passenger trains and among them was a certain passenger train then known designated and described as train number 3 in all time tables bulletin boards, advertising matter and posters used and distributed along the said railway lines and transportation system by the said Walker D. Hines as Director General of Railroads while under Federal control; that said above described train was a train equipped, used and operated as a common carrier of passenger traffic over the said railway lines and transportation system of the said Railway Company by the said Director Gen-

eral of Railroads from the City of Chicago, in the State of Illinois, to the City of Denver, in the State of Colorado, and across and through the states of Illinois, Iowa, Nebraska, Kansas and Colorado.

5. That on the 31st day of July, 1919, the said Lewis Goodyear had gone to the said yards of the said Railway Company at Belleville, Kansas, then operated, controlled and used by the Director General of Railroads as before alleged, to render services in the line of his employment as a car and train inspector; that during the hours of his employment on the said date he had inspected incoming and outgoing passenger and freight trains in said yards, a portion of which trains had been engaged in interstate commerce, and a portion in intrastate commerce; but that this plaintiff is now unable to state whether or not the said Lewis Goodyear was at the time he received his injuries engaged in the performance of his duties at said time, in connection with trains engaged in interstate commerce or those engaged in intrastate commerce; but believes and therefore alleges that prior to the arrival of said train number 5 he had gone upon the right of way of the said Railway Company near the tracks of the said Railway Company preparatory to inspecting and repairing the train equipment and cars contained in and making up train number 5; that prior to the arrival of the said train number 5 on said date certain other employees of the said Director General of Railroads, acting in the line of and within the scope of their employment, had loaded baggage, mail and other articles upon trucks in the said railway yards; that said employes, preparatory to loading said baggage, mail and other articles on said train number 5 had placed said trucks upon the right of way along the track of the said railway lines upon which train number 5 was scheduled and expected to arrive; that because of the negligence of the said employes of the said Director General of Railroads the said trucks

were placed so near to the said track upon which said train was expected to arrive that there was not sufficient space left between the said trucks and the said track to permit the passage of a locomotive engine and train such as was generally used and operated on the said railway lines and transportation system by the said Director General of Railroads, and wholly insufficient to allow the passage of a locomotive engine of the style and size used generally and continuously on train number 5; that because of the negligent acts of the said employees above referred to in placing the said trucks along the said track in the negligent manner above set forth, the said locomotive, which was attached to the said train number 5, collided with one of the said trucks; that said locomotive engine struck the said truck with such force that the said truck was shoved, pushed and knocked from the said position, in which it had been negligently placed by the aforesaid employees, for a distance of fifteen or twenty feet and causing the same to be thrown away from the said track and upon and against the said Lewis Goodyear who was then rightfully upon the said right of way and in the performance of his duties as aforesaid; because of the said truck having been struck by the said locomotive engine attached to said train number 5, which collision and striking was the direct and proximate result and a necessary consequence of the negligent placing of the said truck by the said employees as above alleged, and because of the same being hurled, pushed, shoved and knocked upon and against the said Lewis Goodyear, the said Lewis Goodyear suffered and sustained serious, painful and permanent physical and bodily injuries; that such injuries consisted of severe bruises on the legs, hips, chest, back, arms and head of the said Lewis Goodyear which caused much physical pain and suffering and mental anguish, and of fractured, crushed and dislocated ribs on the right side; that said fracturing, crushing and dislocating of the said ribs

caused serious and painful injuries to be inflicted upon and about the heart and lungs of the said Lewis Goodyear; that said injuries inflicted upon and about the lungs of the said Lewis Goodyear caused and resulted, among other conditions in a permanent impaired and diseased condition known as Traumatic diemia; that said injuries inflicted upon and about the head of the said Lewis Goodyear caused and resulted, among other things, in a permanent impaired and diseased condition of the heart known as hypertrophied heart; that said impaired and diseased condition of and about the said lungs and the said heart continued and increased in degree and in permanency from the date of the said injuries until the 4th day of May, 1920 when the said Lewis Goodyear died as a result of the injuries received on July 31st, 1919 as above set out, and which were the direct and proximate result of the negligence of the employees of the said Director General of Railroads as hereinbefore alleged.

6. Plaintiff further states, that at all times from the date of the said injuries sustained by and inflicted upon the said Lewis Goodyear as hereinbefore alleged up to and including the date of his death, the said Lewis Goodyear suffered severe and great bodily and mental pain and anguish; that said Lewis Goodyear was compelled to expend sums of money for medical and surgical attendance and for nursing from the date of the said injuries and up until the date of his death which resulted from the said injuries; that because of the said injuries above alleged the said Lewis Goodyear was wholly incapacitated and rendered totally unable to attend to and perform the duties in connection with his avocation and employment as a car and train inspector above alleged; that said Lewis Goodyear was rendered wholly incapable of rendering or performing any kind of manual services or labor because of said injuries from the date of said injuries to the date of his death;

that at the time of the said injuries and for some time previous thereto the said Lewis Goodyear had been earning a monthly wage of approximately One Hundred Sixty and no 100 Dollars ($160.00.)

7. Plaintiff further states, that at the time of the death of the said Lewis Goodyear, he left surviving him as his heirs at law the following named parties: Louisa Goodyear, his widow, aged 56 years; Katie Bell Horner, his daughter, aged 35 years; Edward L. Goodyear, his son, aged 34 years; Charles H. Goodyear, his son, aged 32 years; Louis E. Goodyear, his son, aged 25 years; Mary E. Goodyear, his daughter aged 22 years; and Esther L. Goodyear, his daughter, aged 17 years; that this action is prosecuted for the benefit of the said surviving widow and children of the said Lewis Goodyear by the said Louisa Goodyear, as Administratrix of the estate of the said Lewis Goodyear, deceased.

8. Plaintiff further alleges, that at the time of the death of the said Lewis Goodyear as hereinbefore alleged the said Louisa Goodyear the wife of the said Lewis Goodyear, and Esther L. Goodyear, his daughter, were wholly dependent upon the said Lewis Goodyear for their support and the other necessaries of life; that the said Mary E. Goodyear, his daughter, was dependent in part upon the said Lewis Goodyear for her support and the necessaries of life.

9. Plaintiff further alleges, that at the time of the injuries hereinbefore alleged to have been suffered by the said Lewis Goodyear were sustained, the said Lewis Goodyear was then earning a monthly wage of approximately one hundred sixty dollars ($160.00); that the said Lewis Goodyear was, previous to the date of the said alleged injuries, in good health and sound physical condition; that he was industrious and continually employed; that he was of a sober and temperate disposition; that he was kindly in his treatment of his family and always made pro-

vision for them to the full extent of his financial ability; that at the date of the death of the said Lewis Goodyear, he was of the age of sixty-five years (65), one (1) month, and twenty-eight (28) days.

10. That because of the aforesaid physical injuries and bodily and mental pain and anguish suffered by the said Lewis Goodyear as a result of the said injuries inflicted upon and sustained by the said Lewis Goodyear as a result of the negligence of the employees of the Director General of Railroads as hereinbefore alleged, said Lewis Goodyear was damaged in the sum of Five Thousand Dollars ($5000.00) that by reason of the medical, surgical and nursing expenses incurred because of the said injuries hereinbefore alleged said Lewis Goodyear was damaged in the sum of five hundred dollars ($500.00); that by reason of the loss of time and because of the impairment of the earning capacity of the said Lewis Goodyear, damages were sustained in the sum of Fifteen Hundred Dollars ($1,500.00); and that because of the pecuniary damage to those dependent on the said decedent, the plaintiff should recover an additional sum of five thousand dollars ($5,000.00); that none of the said damages have been paid, but are owing to this plaintiff.

Wherefore, plaintiff prays judgment against the above named defendant, by reason of the first Cause of Action, in the sum of Twelve thousand dollars ($12,000.00) and for the costs of this action.

In due time the appellant filed his answer to said petition, which, omitting formal parts and that part relating to the Second Cause of Action under State Compensation Act, is as follows:

ANSWER

Comes now the defendant and for his answer to plaintiff's petition states:

Defendant denies specifically each and every material allegation in plaintiff's petition contained except such as are hereinafter admitted, and such denial is made as to all allegations in the first and second causes of action, respectively, of said plaintiff's petition.

Further answering plaintiff's first cause of action, this defendant states that if the said Lewis Goodyear was injured in the manner and form as alleged in said petition, such injury was sustained through the fault and negligence of the said deceased, Lewis Goodyear, in that it was his duty as an employe in and around the premises of this defendant to see that the station platform trucks and all other facilities for handling the business of the defendant were in safe condition and in safe position, that it was the duty of the decedent to observe the proximity of the truck or trucks mentioned in the plaintiff's petition to the railroad tracks, and that if the said trucks were in such close proximity to the tracks as not to admit of safe passage of the train, it was then the duty of the deceased to move the trucks into a safe position so as to give sufficient clearance thereof to admit the safe passage of engines and trains running upon such track; that if the injuries alleged to have been sustained by decedent were so sustained as alleged, the same were the result of the carelessness and negligence of the said deceased in failing to observe the dangerous position of the said trucks and in failing to move the same or to warn other employees so that the latter might remove the said trucks a safe and proper distance from the railroad track or tracks.

Answering further, defendant states and alleges that plaintiff's decedent, in the nature of his employment, assumed the risk and hazard of all dangers and accidents incident to the operation of trains at stations and of the kind and character alleged to have been sustained by him herein.

Answering further, this defendant alleges as a defense to this action that on or about the 16th day of March, 1920, this defendant or his predecessor in office paid and caused to be paid to Lewis Goodyear, plaintiff's decedent, One Thousand One hundred Thirty-Five Dollars ($1135.00) as and for full settlement and complete satisfaction for the injuries alleged to have been sustained by the said Lewis Goodyear and for all the injuries of whatsoever kind and character alleged to have been sustained by the said Lewis Goodyear on or about the 31st day of July, 1919, at or near Belleville, the same being injuries set forth in plaintiff's petition herein; that at the time of the payment of the said money by this defendant and the receipt thereof by said decedent, he executed a general release on defendant's Form 1570, the original whereof will be produced at the trial of this cause. A copy thereof is hereto attached marked Exhibit "A" and made a part of this defendant's answer; that the said Exhibit "A" is made a part of defendant's answer as fully as if written at length in the body of this answer.

Wherefore, having fully answered plaintiff's petition, this defendant prays that he may be discharged with all costs in this behalf laid out and expended.

EXHIBIT "A"

File No. 19-9384 Nebraska Division

GENERAL RELEASE

WHEREAS, I Lewis E. Goodyear of Belleville of the County of Republic, State of Kansas, was injured at or near Belleville, State of Kansas, on or about the 31st day of July, 1919, on a line of railway operated by the Director General of Railroads, operating Chicago, Rock Island & Pacific Railroad, while employed as car inspector, under circumstances which I claim render said Director General liable to me in damages, although said claim and liability are denied on his part, and the undersigned being desirous to compromise, adjust and settle the entire matter;

NOW, THEREFORE, for the SOLE and ONLY consideration of the sum of ELEVEN HUNDRED THIRTY FIVE AND NO/100 Dollars ($1135.00), to me this day paid by said Director General, operating Chicago, Rock Island & Pacific Railroad, in behalf respectively of himself as such Director General and of the other parties below designated, I do hereby compromise said claim and do respectively release and forever discharge said Director General of Railroads, operating Chicago, Rock Island & Pacific Railroad and his successor or successors as such the United States of America, The Chicago, Rock Island and Pacific Railway Company, the owner of said Railroad, and all railway companies whose lines are leased to said Railway Company or have been operated by it but are now operated by said Director General, and their respective agents and employes, from any and all liability for all claims and demands for all damages resulting from the injuries received by me at the time and place above stated, including such injuries as may hereafter develop as well as those now apparent, and also do release and discharge them and each of them, of all suits, actions, causes of action and claims for damages on account of injuries to my person, as well as damages to my

property, if any, which I have or might have arising from, growing out of, or in anywise connected with the accident above referred to, and do hereby acknowledge full satisfaction of all such liability and causes of action.

In making this settlement and executing the release, I rely solely on my own judgment and information, and do not rely on any statements of or representations as to the facts of the accident or of the character and extent of my injuries which may have been made to me by said Director General or by any of said Railway Companies, or by any of their officers, agents, employes or physicians, respectively, or by any other persons, and I fully realize that my judgment as to the extent of my injuries, and all expressions of others with reference thereto, rest upon opinion only, and may be erroneous.

It is expressly understood and agreed that this settlement carries with it no promise whatever of continued or future employment.

It is further expressly understood and agreed that this release shall be deemed to be and shall be a complete bar to any action which might otherwise be brought, either by law, or under any state or federal workmen's compensation act, employers' liability act, labor law, or any other statute, for the recovery of compensation or damages on account of said injuries (or of resulting death, if this be executed by an administrator or administratrix of the estate of said person), for the benefit of any person whomsoever or estate whatsoever.

I further represent and covenant that at the time of receiving said payment and signing and sealing this release, I am of lawful age and legally competent to execute it, and that before signing and sealing it I have fully informed myself of its contents and executed it with full knowledge thereof.

READ THIS RELEASE.

I have read and understand the above release.

Given under my hand and seal this 16th day of March, A. D. 1920, in presence of: (Sign here)

Lewis E. Goodyear (seal)

B. H. Stiers (seal)

Paid by draft No. 22752, drawn by B. H. Stiers, Adjuster, Lincoln, Neb.

(Filed June 18, 1921.)

Thereafter appellee filed her amended reply as follows:

AMENDED REPLY.

Plaintiff for her reply to the answer of the above named defendant made to the petition of the plaintiff herein, states:

That she denies each and every allegation and averment contained in the said answer which in any manner contradicts or controverts the allegations and averments set forth and related in the petition of the plaintiff on file in this action; and, further alleges the facts to be as related in the petition on file in his action.

Further replying to the answer of the said defendant, this plaintiff says:

That the said sum of One Thousand One Hundred Thirty-five Dollars ($1135.00) which was paid to the said Lewis Goodyear, now deceased, during his lifetime by the predecessor of the defendant herein, was paid to the said Lewis Goodyear, now deceased, in settlement and satisfaction of any claim that the said

Lewis Goodyear had or might have against the said predecessor of the said defendant for loss of time and wages suffered, because of the said accident and injuries related in the petition, from time of injury to on or about March 1st, 1930, and specifically and specially denies that said sum was paid to the said Lewis Goodyear in either full settlement or partial satisfaction of any claim which the said Lewis Goodyear had or might have as against the said predecessor of this defendant by reason of physical injuries, pain and mental anguish suffered as a result of the said accident and the resulting injuries; or in settlement or satisfaction of any claim now sued upon in this action.

That the said Lewis Goodyear did sign the said written instrument, a copy of which is attached to the answer of the defendant herein, marked as Exhibit "A", but that he signed the same under the mistaken belief that the same was only a release of any claim that he had or might have for loss of time and wages because of such accident and injuries; and the said Lewis Goodyear signed the said release at a time when he was mentally and physically incapacitated and incapable of understanding the nature of the instrument he was signing and the extent of the release; and at a time when he was confined to his bed during his last and final sickness after he had been sick for a long time previous thereto, and at a time when he still hoped and believed that he would be restored to his former health, and would be able to resume his position with the defendant, and at a time and under conditions when he was fearful of not doing just what the defendant and his agents and officials required because of fear of losing his position with the defendant, and at a time when he was incapable of understanding and did not understand what he was executing; that at the time the said Lewis Goodyear signed the said release, such

release was not read to him and he did not read it and was physically and mentally unable to read and understand the same but the agents and servants of the defendant led him to believe that all he was signing was a release or settlement for any claims for wages for the time that he had been out of work; that said Lewis Goodyear did not understand that said release which he did sign purported to release the defendant from all claims on the part of Lewis Goodyear and his heirs and assigns and personal representatives; that the said Lewis Goodyear signed the said Exhibit "A" solely by reason of and because of the misrepresentation of facts herein or because of the mistake and misunderstanding of the said Lewis Goodyear upon the representations and statements of the officers, agents, employees and physicians of the said defendant's predecessor, which representations were made with knowledge of their falsity, or in reckless disregard of the truth thereof, and which representations and statements were untrue, and upon which representations and statements he relied and acted, wherein it was represented and stated to the said Lewis Goodyear by the said officers, agents, employees and physicians that the said injuries received by the said Lewis Goodyear, as a result of the accident described in the plaintiff's petition, were only of a temporary nature and such that no permanent or serious results would follow, and that the said Lewis Goodyear would be able to resume his work and continue his employment within a short time with the defendant, at his former position, and the said Lewis Goodyear was promised and assured and did believe that his former position was open to him at his former salary, and that he would shortly be able to resume his labor at such position; and that the payment made would compensate him for the time and wages that he lost because of the said accident and injuries, and that the same was being paid to him as compensation only for said loss of time and wages which he

would have realized and earned during the said time if the said accident had not occurred, and that the said compensation was not in payment of any claims for damages made by the plaintiff herein; for physical injuries, pain or suffering caused by the said accident; or,

That the said Lewis Goodyear and the said officers agent, employees and physicians of the predecessor of the said defendant were mutually mistaken as to the extent, the nature of, and the serious and permanent degree of the said physical injuries which were received by, and inflicted upon the said Lewis Goodyear because of the said accident; that they believed the said injuries were only slight and of a temporary nature and degree from which the said Lewis Goodyear could and would shortly recover and therefore could shortly resume his work; and that the promises and statements and inducements were made and relied on as alleged in the preceding paragraph, but instead, the said injuries were of so serious and permanent nature and degree that the said Lewis Goodyear died within less than one hundred days subsequent to the date of the said purported settlement and release, without having shown any indication of improvement in health and strength; that because of the said mutual mistake on the part of the said Lewis Goodyear and the said officers, agents, employees and physicians of the predecessor of the said defendant the said release and settlement was founded upon a mutually mistaken belief, and that the said sum was tendered and accepted only as wages for the time lost by said Lewis Goodyear, as hereinbefore alleged, and said sum is wholly inadequate and not intended to compensate the said Lewis Goodyear, or his personal representative and estate for all resulting damages; and that, because of said mutual mistake on the part of the parties to the said release, the said release is void as to this plaintiff.

Plaintiff further states, that the said settlement and satisfaction so alleged to have been made, if made, and if the same is held to be a full and complete release of all claims for damages on the part of the said Lewis Goodyear, and binding on his estate for said damages, all of which this plaintiff denies, still the same would not, in any manner or form, release the said defendant from liability to the personal representative of the estate of the said Lewis Goodyear, deceased, or his estate, for any damages or injuries suffered or sustained by said estate and personal representative by reason of the death of the said Lewis Goodyear which followed as the direct and proximate result of the said injuries received by the said Lewis Goodyear as related in the petition of the plaintiff herein; that the said Lewis Goodyear was without power or authority of any kind or nature to make any release which would, in any manner or degree, be binding upon the personal representative or estate of the said Lewis Goodyear, or effectual in any manner as a release of any claim for damages and compensation suffered by the said personal representative and estate by reason of the death of the said Lewis Goodyear because of the said injuries received as alleged and related; that said release, settlement and satisfaction, if made, could, at the most, operate only as a release of, and settlement for such damages as were sustained by the said Lewis Goodyear prior to his death and subsequent to the injuries sustained and for which he might have maintained an action for the recovery of during his lifetime.

That said release, satisfaction and settlement is wholly void and without legal effect, and not a bar to this action, or a proper and legal defense to the cause of action stated in the plaintiff's petition by reason of the fact that the same was never recorded in the office of the Clerk of the District Court of Republic County, Kansas, or any other county as required by law.

Wherefore, plaintiff prays judgment in this action as was prayed for in the original petition on file in this action.

TRIAL.

Issues having been joined, the cause came on for trial, October 29 to November 10, 1924.

Thereupon, at the conclusion of all the evidence, appellant requested the court in writing to instruct the jury, and filed and submitted eighteen written instructions, of which requested instructions fourteen were refused by the court. The instructions follow:

INSTRUCTIONS REQUESTED BY DEFENDANT.

No. 1. You are instructed that there is not sufficient evidence in this case to show mental incompetency of Lewis Goodyear and for that reason you will not consider that question in arriving at your verdict.

No. 2. You are instructed that there is not sufficient evidence in this case to show any fraud or misrepresentation on the part of the defendant, such as is claimed by the plaintiff and for that reason you will not consider that question in arriving at your verdict.

No. 3. You are instructed that there is not sufficient evidence in this case to show any mutual mistake such as is claimed by the plaintiff and for that reason you will not consider that question in arriving at your verdict.

No. 4. You are instructed that the release pleaded by the defendant is valid and binding as shown by

the evidence and you are directed to return verdict for the defendant.

No. 5. You are instructed that the plaintiff has no legal right to recover for pecuniary loss resulting to the dependents of Lewis Goodyear, because of his death, for the reason that he settled therefor in his lifetime and released the defendant therefrom by the release pleaded and introduced in evidence by the defendant.

No. 6. You are instructed that said release here in evidence is a complete bar to the claims of the plaintiff, unless you find that it was executed by Lewis Goodyear by reason of fraud and misrepresentation on the part of the defendant or because Lewis Goodyear was mentally incapable of executing said release at the time he signed same, or because of mutual mistake of a past or present fact material to the contract on the part of the defendant and of said Lewis Goodyear.

If you find from the evidence that said release should not be set aside for any of the reasons set up by the plaintiff, then you should find for the defendant and need not consider any further matters in the case.

No. 7. In this action it is claimed that the release was obtained through fraud and misrepresentation. In determining whether Lewis Goodyear was induced to sign said release by the fraud or misrepresentation of the defendant, you are instructed that fraud is never presumed but must be affirmatively proven by the party alleging same. The law presumes that all men are fair and honest—that their dealings are in good faith and without intention to cheat or defraud others; where a transaction called in question is equally capable of two constructions—one that is fair and honest and one that is dishonest—then the law is that the fair and honest construction must

prevail, and the transaction in question must be presumed to be fair and honest.

No. 8. (Given as No. 13.)

No. 9. (Given as No. 16.)

No. 10. You are instructed that the mere fact, if it be found by you to be a fact in this case, that the settlement and satisfaction negotiated and entered into between Goodyear in his lifetime and an agent of the defendant herein, was based upon a sum of money equivalent to the loss of wages by said Goodyear, during the time between the date of his injury and the time of such settlement, would not prevent the release given by Goodyear at the time from operating as and for a settlement in full of all the claims, demands and causes of action enumerated and referred to in said release.

No. 11. (Given as No. 20.)

No. 12. You are instructed that where one injured in an accident voluntarily executed a written release upon a consideration adequate for the injuries then known, in the absence of fraud, he cannot on subsequent discovery of injuries not known or suspected at the time of the settlement, obtain a cancellation of the release on the ground of mistake and recover for such injuries, although the compensation received may be wholly inadequate in view of the injuries actually inflicted.

No. 13. (Given as No. 11.)

No. 14. You are instructed if you find and believe from the evidence that Lewis Goodyear was employed around the premises of the defendant and that among his duties was that of seeing that the station platform, trucks and other facilities for handling the business of the defendant were in safe condition or in safe position, and that an engine of the defendant run

ning upon its regular track hit a truck standing nearby because the truck was in too close proximity to the track and that Lewis Goodyear was experienced in the class of work in which he was then engaged and saw or by the exercise of reasonable diligence could have seen and observed that said truck was in such position that it would be hit or that it was likely to be hit by engine or train operated on said track, then it was the duty of said Lewis Goodyear to place said truck in such position that it would not be hit.

No. 15. You are further instructed that if you find and believe from the evidence that it was the duty of Lewis Goodyear, among other duties assigned him, to see that the station platform at Belleville was in reasonably safe condition or that it was his duty to observe the location of trucks placed upon the platform or near the tracks, so that trunks, baggage or express placed thereon might be loaded on incoming trains or that trunks, baggage and express might be unloaded from such train on to said truck or trucks, and if you further find and believe from the evidence that it was his duty to observe and see that such trucks were not placed or permitted to remain too closely to the tracks, thereby being in danger of being hit or struck by incoming engines or trains and that he failed to observe that the truck involved herein was in such close proximity to the track that it would be hit or was likely to be hit by an incoming engine or train; and that as a result of his failure to observe the said truck and remove the same from its dangerous proximity to the said track, and he was injured by a collision between the truck and an incoming train, then plaintiff would not be entitled to recover.

No. 16. You are instructed that if you find and believe from the evidence that it was the duty of Lewis Goodyear to see that trucks and other facilities for

handling business of the defendant at Belleville were in safe condition and in safe position and that by reason of the failure to perform such duty he was injured by reason of an incoming engine striking a truck located too closely to the track on which said engine was approaching, and if you find that such injury was due to the carelessless or negligence of said Lewis Goodyear to perform his duty in the respect hereinbefore mentioned, and if you further find that his failure to observe the proximity of the said truck to the said track or to move the said truck to a point to admit of the safe passage of an engine or train operated on said track, and that as a result of a collision he was injured and that the failure of said Lewis Goodyear to perform his duties was the proximate cause of his injury, then you are instructed that plaintiff herein would not be entitled to recover in this action.

No. 17. If you find and believe from the evidence in this case that Lewis Goodyear at the time of his injury was engaged upon an instrumentality of interstate commerce and that he and the defendant effected settlement and compromise in good faith for a good consideration for such injuries, and that he afterwards died, plaintiff Louisa Goodyear as administratrix of the estate of Lewis Goodyear, is not entitled to bring and maintain an action based upon such injuries so sustained by her deceased husband—unless you further find that such settlement was brought about through fraud or that said Lewis Goodyear was mentally incapable of entering into a contract for the settlement and satisfaction of such injuries or that there was such mutuality of mistake as defined in these instructions, such as would justify setting aside of the release pleaded in defense of this action.

No. 18. You are instructed that the foundation of liability in cases arising under the federal employer's liability act is negligence, and if you find and believe

from the evidence that the defendant was negligent in respect to some duty it owed the deceased, and if you find and believe from the evidence that the deceased Lewis Goodyear was himself negligent in observing the condition existing upon the railroad premises, particularly with respect to the proximity of the truck in question to the railroad track upon which train No. 5 was expected to and did arrive, you may consider his negligence in the matter of reducing the damages, if any, which you may allow to plaintiff herein.

Requested and submitted by defendant.

Filed Nov. 8, 1924.

Thereupon the court prepared and submitted to the jury fifty-six written instructions, as follows:

INSTRUCTIONS.

No. 1 The plaintiff in this case sues upon two causes of action. At the close of the plaintiff's testimony the defendant demurred to the second cause of action, and the court sustained the same for the reason that no testimony had been offered by the plaintiff under that cause of action; and you are directed to return a verdict in favor of the defendant and against the plaintiff on the plaintiff's second cause of action.

It is admitted by the statement of the parties and by the evidence offered that the plaintiff is the duly appointed, qualified and acting Administratrix of the Estate of Lewis Goodyear, deceased, and that this action is rightfully brought by her as Administratrix; that the defendant was at all times concerned in this action the agent of the Director General of Railroads and the proper party against whom this case should be brought; that all parties working on or for the

Rock Island Railway, as testified in this case, are to be considered by you as the agents, employees and servants of the defendant so far as this case is concerned; that the deceased, Lewis Goodyear, was an employee of the defendant, and at the time of the accident complained of was rightfully upon the property of said defendant in the performance of his duties for said defendant, and was injured while in the performance of said duties and by said defendant; and that said injury occurred while the decedent was employed in interstate commerce.

No. 2 outlines the claims in the first cause of action of appellee's petition.

No. 3 outlines the defenses in the answer of appellant.

No. 4 outlines the allegations of appellee's reply.

No. 5 states that outlines of the pleadings are given to present the issues, but are not to be considered as evidence.

No. 6 relates to filing the release under compensation act, and appellee having introduced no evidence thereon, the jury was instructed not to consider that fact.

No. 7. As one of the defenses to the action of the plaintiff the defendant contends that Lewis Goodyear by his written release executed March 16, 1920, released the defendant from all claims for injuries or damages sustained by him, and that this is a complete bar to recovery by the plaintiff in this action.

The plaintiff admits that Lewis Goodyear signed the said release but contends that the same was signed by Lewis Goodyear by reason of the fraud or misrepresentation of the defendant, or because Lewis Goodyear at the time of signing said release was mentally incapable of executing the same, or because of the mutual mistake on the part of said Lewis Good

year and the defendant as to the seriousness of the injuries alleged to have been received by Lewis Goodyear.

No. 8. You are instructed that The Federal Employers' Liability Act, under which plaintiff's action was brought, creates two separate and distinct rights of action resulting from an injury such as complained of by the plaintiff in this case; one right of action to the injured employee for his suffering and loss resulting from the injury, and one to his personal representative for the benefit of his surviving widow and children, in the event death results from the injury.

And you are instructed that the latter cause of action could not be released by the deceased Lewis Goodyear by any action taken by him. It accrues solely to his personal representative for the benefit of the persons named and Lewis Goodyear in his lifetime would have no control over same.

In other words, it did not accrue until his death and hence he could not release it by any act on his part.

No. 9. You are instructed that the release set up as a defense in this action is a complete bar to the claim of the plaintiff for the personal loss of the deceased Lewis Goodyear due to the alleged negligent injury to him, unless you find that said release was executed by Lewis Goodyear by reason of fraud and misrepresentation on the part of the defendant, or because Lewis Goodyear was mentally incapable of executing said release at the time he signed same, or because of mutual mistake on the part of the defendant and of said Lewis Goodyear which caused said Goodyear to sign said release. But unless you find said release is a bar to said recovery, then said cause of action may be maintained by the plaintiff for the benefit of the surviving widow and children.

No. 10. If you find from the evidence that said release should not be set aside for any of the reasons set up by the plaintiff, then you should find for the defendant upon that point and need not further consider the right of plaintiff to recover for suffering and loss resulting to Lewis Goodyear for the injuries which it is alleged he received by the act of defendant.

But if you find that said release should be set aside for any of the reasons set up by the plaintiff, then you should consider her said claim under the succeeding instructions upon that point.

No. 11. You are instructed that the law favors a compromise and settlement of disputes, and when parties in good faith enter into an agreement based upon good consideration and where said agreement has not been secured by fraud, misrepresentation, mental incapacity or mutual mistake, then neither party is afterwards permitted to deny it.

No. 12. In determining whether Lewis Goodyear was induced to sign said release by the fraud or misrepresentation of the defendant, you are instructed that fraud is never presumed but must be affirmatively proven by the party alleging same. The law presumes that all men are fair and honest—that their dealings are in good faith and without intention to cheat or defraud others; where a transaction called in question is equally capable of two constructions—one that is fair and honest and one that is dishonest—then the law is that the fair and honest construction must prevail, and the transaction in quesion must be presumed to be fair and honest.

No. 13. You are instructed that while fraud is not to be presumed without proof, yet fraud, like any other fact, may be proved by proving circumstances from which the inference of fraud is natural and irresistible, and if such circumstances are proved, and they are of such a character as to produce, in the

minds of the jury, a conviction of the fact of fraud, then it must be considered that fraud is proven.

No. 14. Fraud is usually only required to be proven by a preponderance of the evidence, but in this case where the plaintiff seeks to set aside a written release on the ground that it was procured by fraud and misrepresentation, the burden is upon her to show such fraud and misrepresentation by clear, decided and satisfactory evidence. A slight preponderance of the evidence is not sufficient, but it must be proven by evidence which to the jury is clear, decided and satisfactory.

No. 15. It is difficult to state accurately what constitutes false representations or misrepresentations or as to the right of one person to rely upon representations made by another, since the question always depends upon the facts of the particular case and the circumstances under which the representations were made; and in this case it is for the jury to determine whether the representations alleged to have been made to Lewis Goodyear were false, and whether or not, under the circumstances of this particular case he should have relied upon them.

You are instructed that ordinarily the representations relied upon must have been of such a character, and must have been made under such circumstances, as would justify their belief by a person of ordinary intelligence and prudence; but in determining these facts you should consider the respective character, intelligence, experience, age, and the mental and physical condition of the parties. And such false representations or misrepresentations must be proven by evidence which to the jury is clear, decided and satisfactory.

No. 16. You are instructed that the expression of an opinion honestly entertained, as to a matter wherein opinions may differ, by a physician or other

employee of the defendant in this case, cannot afford ground to set aside a settlement and satisfaction, such as has been shown by the evidence in this case, upon the ground that the same was obtained by fraud.

Therefore, if you find from the evidence in this case that any physician or other employee of the defendant expressed an honest opinion as to the condition of health or recovery of Goodyear, or as to his ability to return to work, and if you believe that as to such matters opinions might honestly differ, then such facts would not constitute fraud or misrepresentation, and could not form the basis of a finding on your part that the settlement and satisfaction made and given by Goodyear should be set aside on that ground.

No. 17. One of the grounds alleged in plaintiff's petition for setting aside the release is that Lewis Goodyear was not in possession of his mental faculties at the time of the execution of the release, and that thereby he was rendered incompetent in law to transact business.

If you find from the evidence, and by evidence which is clear, decided and satisfactory, that at the time Lewis Goodyear executed the release in question here he was not mentally capable of executing the same then you would be justified in holding said release null and void.

No. 18. You are instructed that the fact that the wife of Lewis Goodyear was present at the time an agent of the defendant made a settlement with him for his injuries would not estop her, as personal representative of his estate, from seeking to set aside the release because of his mental incapacity to execute it.

No. 19. You are instructed that the mere fact, if it be found by you to be a fact in this case, that the settlement and satisfaction negotiated and entered

into between Goodyear in his lifetime and an agent of the defendant herein, was based upon a sum of money equivalent to the loss of wages by said Goodyear during the time between the date of his injury and the time of such settlement, would not alone prevent the release given by Goodyear from operating as and for a settlement in full for his suffering and loss from the injury.

No. 20. You are instructed that a written release of an employer from further liability on account of an injury to an injured employee cannot be set aside on the mere ground that it was signed by the employee without reading it, where he was able to read it, and no obstacle to his doing so was presented, and no misrepresentation was made as to its contents.

No. 21. In order to find that there was a mutual mistake of parties in making the settlement plead by defendant and to justify you in setting aside the release made on March 16, 1920, you must find by clear, decided and satisfactory evidence that said release was executed under a mistake of both Lewis Goodyear and the defendant as to the extent of Goodyear's injuries. It is not enough that Goodyear executed the release under a mistaken belief as to the extent of his injuries but both parties must have been honestly mistaken and the release executed because of such mistake.

In other words, unless you find that both parties were acting under a misapprehension of the real condition of Lewis Goodyear or of the gravity of his injuries then there would be no mutual mistake and the release should not be set aside for that reason.

But if you find that both parties were acting under such mutual mistake, then such release should be set aside.

No. 22. You are instructed that in order to maintain this action and to set aside the release for any of the reasons set up by plaintiff it is not necessary that she be required to first return the money received as consideration therefor.

If you find that the release in this case should be set aside for any of the reasons claimed by plaintiff, then the release should be treated as a credit, as will be hereinafter explained to you.

No. 23. If you find from the evidence under the instructions heretofore given you that the release given by defendant on March 16, 1920, should be set aside, then you should proceed to consider the further questions in the case which would be, first, was the deceased Lewis Goodyear injured by reason of the negligent act or acts of the defendant, and if so what damages should his personal representative receive for the suffering and loss sustained by him; and second, was his death caused by the negligent act or acts of the defendant and if so what damage should his personal representative receive for the loss resulting from his death.

No. 24. You are instructed that any person or corporation operating a railroad is required to use ordinary care and prudence in so doing. If this is done one is not liable for all accidents or injuries that may occur, but is only liable for such when guilty of negligence, that is, in doing something which a person of ordinary care and prudence would not have done, or failing to do something that a person of ordinary care and prudence would have done.

No. 25. So far as is applicable to this branch of the case negligence is defined to be the want of that care and prudence on the part of the defendant in operating his railroad as would be used by a reasonably careful, cautious and prudent person engaged in like activities, and under like conditions.

No. 26. You are instructed that the plaintiff's right to recover does not turn alone upon the fact of Lewis Goodyear having suffered injury, but such injury must have been the direct and proximate result of some act of negligence on the part of the defendant.

In other words, the negligent act or acts of the defendant must have been the proximate cause of his injury; and the question whether or not the negligence complained of was the proximate cause of the injury to determine from the evidence.

"Proximate cause" means the cause which is the immediate, direct or moving cause of the injury, the cause from which the injury follows as the usual, ordinary, natural and probable result following said cause.

No. 27. You are instructed that where the duty rests on any person to exercise reasonable care and caution, the failure to exercise such reasonable care and caution constitutes negligence, and if you believe from the evidence in this case that Lewis Goodyear was negligent in failing to exercise reasonable care and caution in his acts and conduct with reference to the matters in this case, and that his conduct in that respect was such that the injuries would not have occurred but for his failure to exercise care and caution, then he must be considered by you as contributing to the injuries which he received, and this is spoken of in the law as "contributory negligence".

The defendant having alleged as one of his defenses that Lewis Goodyear was guilty of contributory negligence, the burden of proving said contributory negligence is upon the defendant.

No. 28. You are instructed that under The Federal Employers' Liability Act, under which this suit is brought, the fact that Lewis Goodyear may have been guilty of contributory negligence, if you find it to

be a fact, does not bar a recovery by his personal representative; but if you find in this case that there was negligence on the part of the defendant and that the personal representative of Lewis Goodyear should recover therefor, and if you further find that Lewis Goodyear was guilty of contributory negligence, as defined above, then the damage which you find due plaintiff should be diminished by the jury in proportion to the amount of negligence attributable to Lewis Goodyear. There is no rule which the court can lay down to assist you in determining to what extent the damages shall be diminished in the event that you find that Lewis Goodyear was guilty of contributory negligence, but such matter is solely in the good conscience of the jury except that you are required to reduce the damages in proportion to the amount of negligence attributable to the one guilty of contributory negligence.

No. 29. You are instructed that negligence can never be presumed from the mere happening of an alleged injury or accident, but that before plaintiff can recover in this case she must show by a preponderance of the evidence that Lewis Goodyear was injured by the defendant through some of the acts of negligence alleged in plaintiff's petition.

No. 30. You are instructed that proof of negligence need not be made by direct and positive evidence alone but may be inferred from other facts and circumstances which are proven in the case, when such inference is a reasonable and natural one to be drawn from the facts and circumstances which are proven.

No. 31. You are instructed that if you find from the evidence that the defendant, or any of its agents or servants, placed or left standing a truck upon or near the track of the defendant, and in such a position that the engine of the passenger train of the defendant struck the truck, and the truck was thereby

thrown against Lewis Goodyear, then the defendant would be liable for all injuries resulting therefrom.

No. 32. You are instructed that if the defendant or any one of its agents or servants operated the engine or train at the time complained of, at such a rate of speed and under such conditions as would amount to negligence, and that Lewis Goodyear was injured because thereof, then the defendant would be liable for all injuries resulting therefrom.

No. 33. You are instructed that it makes no difference in this case as to who placed or left the truck upon or near the tracks of the defendant, if you find that it was negligently or carelessly left or placed at such a place or in such a position as to be negligently struck by the engine of the train of the defendant as it came into the station at the time and place complained of.

No. 34. You are instructed that it is the duty of the defendant to provide Lewis Goodyear a reasonably safe place to work and to safeguard him against the carelessness and negligence of other servants, agents and employees of the defendant; and that such duty would require that no trucks should be left in such a position that they could be struck by trains passing over the tracks of the defendant.

No. 35. You are instructed that Lewis Goodyear in performing his duties for the defendant had a right to assume and believe that it was safe for him to be where he was at the time of the accident complained of and to be at such place in the performance of his duties.

No. 36. You are instructed that it was the duty of Lewis Goodyear in the performance of his duties to the defendant, regardless of his right to assume that defendant would provide a safe place for him to work and to guard him against negligence of his fellow employees, to exercise due care and caution in the performance of his duties.

It was his duty to look about him and see whatever there was in the line of his vision that would affect him or his safety while in the performance of his duties, and he is in the law presumed to have seen what he could or should have seen had he kept a proper lookout."

No. 37. You are instructed that if you find from the evidence that a truck of the defendant was negligently placed or left in such a position that it was struck by an incoming passenger engine of the defendant, that the said Lewis Goodyear would not assume any of the risk in connection therewith; but that the said Goodyear had the right to assume and believe that it was safe for him to be standing where he was, and that he would not thereby be struck by any of the trucks which had been brought upon the property of the defendant for the purpose of receiving the express and baggage from the incoming passenger train, subject to his duty to observe all that he could or should have observed in the exercise of due care and caution for his own safety.

No. 38. You are instructed that all times concerned herein the law required the attending physician, at the death of any person, to make a certificate as to the causes of death of the one who died, as well as other facts to be stated in the certificate but which is of no interest here; the law also provides that a true copy of such certificate, when properly certified by the State Registrar, will be prima facie evidence in all courts of the facts stated therein. The term "prima facie" as used in the law means that the facts stated therein must be taken as true until the jury find that there is sufficient evidence to overcome such facts. And unless the jury find that the facts stated in said certificate of death have been overcome by the evidence, then the facts stated therein shall be taken as true.

No. 39. The undisputed evidence in this case shows that Lewis Goodyear at the time of his death was a little past 65 years of age; and you are instructed that at such an age the Experience Tables of Mortality show that he had an expectancy of over 10 years at the time of his death, had he been at the time in average condition of health.

No. 40. You are instructed that if you find from the evidence that Lewis Goodyear was injured because of any negligence upon the part of the defendant, or his agents or servants, that the plaintiff would be entitled to recover damages for all the ill effects, which, considering the conditions of the health in which Lewis Goodyear was when he received said injuries, naturally and necessarily follow such injury. And that the defendant's liability is in no way lessened or effected, even if you find from the evidence that the injury of Lewis Goodyear would not have resulted had he been in good health, or that his injuries were aggravated and rendered more difficult to cure by reason of the fact that he was not in good health at the time he received said injuries.

No. 41. You are instructed that if you find from the evidence that Lewis Goodyear was injured by the negligent acts of the defendant, and which act accelerated a diseased condition, existing at the time of the injury, thereby hastening and prematurely causing the death of said Lewis Goodyear, that the defendant will be liable for the death of said Goodyear, even though the disease which he had at the time of his injury might have resulted in death at a later time without his having received said injury.

No. 42. You are instructed that if you find from the evidence that Lewis Goodyear was injured by the negligence of the defendant, and that such personal injury aggravated any existing ailment or disease or developed a latent one, that the defendant will be

liable for the results of the disease as well as for the results from the injury itself.

No. 43. You are instructed that if the injuries received because of the negligence of the defendant so injured Lewis Goodyear as to render his system susceptible to a disease as a natural consequence, and that such disease afterward developed and caused his death, then the defendant would be liable for his death and all resulting damages.

No. 44. You are instructed that if you find that Lewis Goodyear was injured because of the negligence of the defendant and thereby suffered physical injuries and bodily and mental pain and anguish, and that the release of March 16, 1920, is not a bar to the plaintiff's recovery, then the plaintiff would be entitled to recover because of said physical injuries and bodily and mental pain and anguish suffered by Lewis Goodyear, such a sum as you find would reasonably have compensated Lewis Goodyear therefor. But in no case can your verdict upon this point exceed the sum of $5000.00 as that is the amount claimed by plaintiff for such injuries to Lewis Goodyear.

If you find that the plaintiff was so injured and that the release was not a bar, then you may find for the plaintiff, even though you find that Lewis Goodyear did not die as a result of the negligence of the defendant; and if you so find for plaintiff, then you should allow for such physical injuries and bodily and mental pain and anguish suffered by Lewis Goodyear from the date of his injury until his death.

No. 45. You are instructed that if you find that the plaintiff is entitled to recover for the injuries and bodily and mental pain and anguish suffered by Lewis Goodyear during his lifetime, then the plaintiff would also be entitled to recover all loss of wages which

you find Lewis Goodyear reasonably would have earned during his lifetime after his injury, had he not been injured; but in no case can you find a sum larger than $1,500.00, as that is the amount claimed by the plaintiff as damages for said loss of wages and impairment of earning capacity.

No. 46. You are instructed that if you find the plaintiff is entitled to recover for the injuries suffered by Lewis Goodyear during his lifetime, then the plaintiff would also be entitled to recover for all medical, surgical and nursing expenses incurred in the care of Lewis Goodyear and which you find from the evidence was expended for such purposes; but in no case can your judgment for medical, surgical and nursing expenses exceed the sum of $500.00, as that is the amount claimed by plaintiff for said expenses.

No. 47. If you find that the plaintiff is entitled to recover for the injuries sustained by Lewis Goodyear, and for the wages which he would have earned, and for the money expended for medical, surgical and nurse hire, in treating him for said injuries, or for either or any of said causes, then you should deduct from whatever sum you find due plaintiff thereon the amount of $1135.00, the amount which was paid Lewis Goodyear at the time he made the release on March 16, 1920. If the amounts just mentioned exceed the amount paid at the time of the release, then you should return a verdict for the excess; but if the amount paid at the time of the release equals or exceeds the amount which you find due the plaintiff for such injuries, loss of time and expenses, then you should not return a verdict for the plaintiff upon these matters.

No. 48. You are instructed that if you find Lewis Goodyear was injured because of the negligence of the defendant and that his death resulted from said injury, then the plaintiff would be entitled to recover

on account of the death of Lewis Goodyear such an amount as you believe will compensate her, and the dependent children of Lewis Goodyear, for the loss of any and all pecuniary benefit which they have been deprived of by the death of Lewis Goodyear.

But in no case can your verdict upon this point exceed the sum of $5,000.00, as that is the amount claimed by the plaintiff in this action.

No. 49. If you find that the plaintiff is entitled to recover because of the death of Lewis Goodyear, as set out in the preceding instruction, then in determining what compensation she should be allowed for said loss, you should consider the age of the deceased, Lewis Goodyear, together with his capacity for earning money, his disposition to contribute, to care for and to furnish his wife and dependents with money, within his earning capacity, as shown by the evidence, the ages of those dependent upon him, and the probable expectation of life of the said Lewis Goodyear and those dependent upon him. And you may further allow him for such sum as you find from the evidence was expended by the plaintiff for the funeral and burial expenses of Lewis Goodyear, but you cannot include in this item any sum expended for a burial plat or lot for said Lewis Goodyear. And in no case must your finding on all of the above matters be for more than $5,000.00, the amount claimed by the plaintiff.

No. 50. If your verdict is for the plaintiff, you will not be required to find separately in your verdict upon each of the matters for which the plaintiff asks damage, but will only be required to return a verdict in one amount for whatever damage you allow her upon her entire cause of action. And if you further find that Lewis Goodyear was guilty of contributory negligence in the acts complained of, then you should diminish the amount you find due

plaintiff in proportion to the amount of negligence attributable to said Lewis Goodyear and return your verdict for the balance; always remembering that you cannot allow her in any event a sum in excess of the amount claimed, and your verdict in no case must exceed the sum of $12,000.00, the amount claimed by plaintiff.

No. 51. Some special questions have been submitted for the jury to answer. The law provides that either party may submit questions for the purpose of having the facts found by the jury, and they are entitled to have such questions answered, and it is as much your duty to answer them as to render a verdict in the case. The answers to the questions should be supported by a preponderance of the evidence, except upon such points as you have been instructed that plaintiff must produce evidence which is clear, decided and satisfactory, and your answers upon those points should be supported by the same amount of evidence.

In answering the questions you are not confined to "Yes" or "No," but may use such language as will fully and fairly express your ideas of what the answers should be. It would perhaps be logical for you to first answer the questions and after this is done take up the question of your general verdict, but this is merely a suggestion and you are at liberty to take the matter up in whatever order will best suit your own ideas. When the questions are answered your Foreman should sign them in the same manner that a general verdict is signed, and they should be returned into court with your verdict.

No. 52. The burden of proof in this case is first upon the plaintiff to establish by a preponderance of the evidence the facts necessary to entitle her to recover in this action, as has heretofore been explained to you.

The defendant having alleged a written release to all liability claimed by the plaintiff, and the plaintiff

having admitted the execution of said release and is seeking to set it aside upon the grounds of fraud, misrepresentation, mental incompetency of Lewis Goodyear, and of mutual mistake between Lewis Goodyear and defendant at the time of the execution of said release, the burden of proof is upon the plaintiff to prove said facts upon which she relies to set aside said release by evidence which to the jury is clear, decided and satisfactory.

The defendant having alleged contributory negligence as a reason why the plaintiff's damages, if any are found, should be diminished in proportion to the amount of negligence attributable to Lewis Goodyear, the burden of proof is upon the defendant to prove such contributory negligence by a preponderance of the evidence.

In determining these questions, as well as all other questions in the case, you are to consider all the evidence offered and received in the case, and if the evidence offered and received does not preponderate either way, but is evenly balanced, then the party upon whom the burden of proof is placed cannot be held to have established that portion of the testimony which you find to be evenly balanced.

By a "preponderance of the evidence" is not necessarily meant the greater number of witnesses, but by it is meant the greater weight of credible evidence, taking into consideration all the facts and circumstances shown by the evidence.

By "credible evidence" is meant such evidence which, when viewed in the light of all the attendant circumstances, appears the most reasonable, logical and worthy of belief.

No. 53 instructs the jury that they are the sole judges of the evidence and of the weight to be given the testimony of the witnesses.

No. 54 instructs the jury to consider the instructions as a whole.

No. 55 instructs the jury to select a foreman who should sign the verdict and answers to the special questions.

No. 56 instructs the jury to give the same weight to expert testimony as to other testimony in the case.

The Court submitted in writing nine special questions to the jury. Said special questions with answers, including the signature of the foreman, are as follows:

SPECIAL QUESTIONS SUBMITTED TO THE JURY.

1. Was the defendant guilty of fraud in making settlement with Lewis Goodyear on March 12 and 16, 1920?

Answer: No.

2. If you find defendant was guilty of fraud in answer to question No. 1, state fully wherein such fraud consisted.

Answer: .....

3. Was Lewis Goodyear mentally capable of transacting business on March 12 and 16, 1920?

Answer: Yes.

4. If you find in answer to question No. 3 that Lewis Goodyear was not mentally competent on the dates mentioned, state fully when he became mentally incompetent.

Answer: .....

5. Do you find there was mutual mistake, past or present, on the part of Lewis Goodyear and the defendant as to Goodyear's physical condition prior

to and on March 12 and 16, 1920, at the times settlement was agreed upon and completed?

Answer: No.

6. If you find there was mutual mistake, as mentioned in question No. 5, state:

(a) Fully in what particulars there was mutuality of mistake.

Answer:

(b) Names of persons who were mistaken.

Answer:

7. Was the release given under a mistaken belief, of Lewis Goodyear and a representative of the defendant, that the material results of the injuries received on July 31, 1919, had disappeared?

Answer: No.

8. Do you allow anything for funeral expenses and burial?

Answer: No.

9. If you answer No. 8 in the affirmative, how much do you allow for funeral expenses and burial?

C. E. Wyman, Foreman.

Filed: Nov. 10, 1924

The cause was submitted to the jury, which returned a verdict (at the same time returning the special questions and answers as aforesaid) as follows:

VERDICT

We, the jury, duly empaneled and sworn in the above entitled action, do upon our oaths find for the plaintiff upon her first cause of action, and we assess her recovery at $2000.00.

And we further find for the defendant and against the plaintiff upon plaintiff's second cause of action.

C. E. Wyman, Foreman.

Filed Nov. 10, 1924.

Thereafter and in due time appellant filed his motion for judgment based upon the special findings of fact made and returned by the jury, notwithstanding the general verdict in favor of appellee, which said motion is as follows:

MOTION FOR JUDGMENT.

Now comes the defendant herein and moves the court for an order rendering judgment in his favor as against the plaintiff, based upon the special findings of fact made and returned by the jury in this action, notwithstanding its general verdict in favor of the plaintiff for the recovery of pecuniary damages, for the reason and upon the ground that said special findings show as a matter of fact and law that no right of action existed in the plaintiff, for the recovery thereof, under the Federal Employers' Liability Act forming the basis of this action, such findings of fact affirmatively showing that the deceased, Lewis Goodyear, was fully paid therefor in his lifetime and any right of action existing therefor was fully settled and the same released by the decedent in his lifetime, and that under such release and the law relating thereto, the same was binding and effective as against the plaintiff in this action, and those for whom she made claim for the recovery of the damages, which the jury erroneously awarded to her by its verdict.

Filed Nov. 11, 1924.

In due time appellant filed his motion for judgment, notwithstanding the general verdict, which said motion is as follows:

MOTION FOR JUDGMENT.

Now comes the defendant herein and moves the court for an order rendering judgment in his favor as against the plaintiff, in relation to all damages, claimed by her in this action as having resulted to said Lewis Goodyear, deceased, in his lifetime, and detailed in her petition herein filed as $5000.00, covering physical injuries and bodily and mental pain and anguish, $1500.00 for loss of time and impairment of earning capacity, and $500.00 for medical, surgical and nursing expenses, for the reason and upon the ground that the special findings of fact made and returned by the jury in this action, affirmatively show that the deceased, Goodyear, was fully paid therefor in his lifetime, and fully and completely released this defendant of all liability therefor as shown by the release executed by him and pleaded in defense in this action, all of which it is asked shall be done, notwithstanding the general verdict of the jury for the recovery of damages by the plaintiff.

Filed Nov. 11, 1924.

Appellant in due time filed his motion for new trial which said motion was overruled. The motion follows:

MOTION FOR NEW TRIAL.

Now comes the defendant and moves the court for an order vacating and setting aside the verdict of the jury, so far as it favors the plaintiff in this action, and so far as it grants recovery of damages to the

plaintiff for the pecuniary loss claimed to have been suffered on the part of those dependent upon the decedent for support, and to grant a new trial of the issues of fact and law under the pleadings relating thereto, for the reasons and upon the grounds following, to-wit:

1. That the court erred in the admission of testimony on the part of the plaintiff.

2. That the court erred in the rejection of evidence offered on the part of the defendant.

3. That the court erred in refusing to instruct the jury as requested by the defendant.

4. That the court erred in instructing the jury as to the law of the case.

5. That the court erred in holding that the settlement and release pleaded by the defendant, was not a bar to recovery by the plaintiff of such damages as were claimed by the plaintiff.

6. That the verdict is contrary to the evidence.

7. That the verdict is contrary to the law.

8. That the verdict is contrary to the special findings made and returned by the jury.

9. That the verdict resulted from passion and prejudice on the part of the jury.

10. That said verdict is contrary to the evidence and the law, for that the special findings of the jury affirmatively show that the settlement and release pleaded by the defendant was valid and binding and barred and foreclosed the plaintiff from all recovery in this action incident to or connected with or resulting from the injuries suffered by the decedent from the accident complained of.

Filed Nov. 11th, 1924.

JUDGMENT.

Thereafter, journal of judgment and of the proceedings after judgment was signed by the court and filed, as follows:

JOURNAL.

Now, on this 29th day of October, 1924, said date being one of the days of the regular October, 1924, term of this court, this cause comes on for hearing and trial, the plaintiff appearing in person and by her attorneys, N. J. Ward and J. F. McClure, and the defendant appearing by his attorneys, J. E. DuMars and W. D. Vance.

A trial by jury is ordered by the court upon mandate of the Supreme Court; and thereupon a jury is duly impanelled and sworn to try the case.

Thereupon the parties make statements to the jury and the plaintiffs begins the introduction of her testimony, and continues the introduction of testimony from day to day up to and including the first day of November, 1924, at which time the plaintiff rests her case. Thereupon, the jury is duly admonished and excused until 9 A. M. on the 5th day of November, 1924. Thereupon and on the 5th day of November, 1924, this cause continues, the jury being present and the parties and attorneys being present as before. Thereupon, the defendant demurs to the evidence of the plaintiff as shown by the written demurrer on file, there being three grounds of demurrer. After due consideration thereof by the court, the court overrules such demurrer as to the first and second grounds and sustained the demurrer on the third ground, such demurrer being sustained as to the second cause of action only and being overruled as to the first cause of action.

Thereupon the defendant begins the introduction of his testimony which is continued until the 7th day of November, 1924, at which time the defendant rests. Thereupon the plaintiff introduces her evidence in rebuttal and rests, and the case is closed and the witnesses discharged and the jury admonished and excused until the 8th day of November, 1924, at 9 A. M.

Thereupon and on the 8th day of November, 1924, the jury is instructed in writing by the Court and the attorneys argue the case to the jury. And thereupon the jury is admonished and excused until 9 A. M. on the 10th day of November, 1924. Thereupon and on the 10th day of November, 1924, at 9 A. M., the jury retires to consider the case and at 2:40 P. M. return into Court with their answers to the special questions and with their verdict in favor of the plaintiff in the sum of $5000.00 and for the defendant on the second cause of action. Thereupon the jury is discharged.

Now, on this 14th day of November, 1924, this cause comes on for hearing, at the same term of court, upon the various motions filed by the parties, the plaintiff appearing by her attorney, N. J. Ward, and the defendant appearing by his attorney, W. D. Vance. Thereupon the defendant presents his motions and which are numbered one, two and three, and which were filed on the 11th day of November, 1924. Motion No. 1 being for judgment in favor of the defendant against the plaintiff upon her claim for $7000.00, being the damages sought to be recovered by the plaintiff, and which the plaintiff claims accrued to Lewis Goodyear during his lifetime. After due consideration said motion is overruled by the court. Thereupon the defendant presents his motion, No. 2, filed on the 11th day of November, 1924, and which motion is for judgment upon the findings of the jury, by reason of the release given,

by Lewis Goodyear, during his life time which motion is overruled by the Court. Thereupon the defendant's motion for a new trial filed on the 11th day of November, 1924, and being No. 3 is presented to the court and after due consideration thereof the same is overruled.

Thereupon, the plaintiff presents her motion No. 4, which is a motion to set aside findings of the jury and was filed on the 11th day of November, 1924, and which motion is overruled by the Court. Thereupon the plaintiff presents her motion for a new trial, being No. 5 and filed on November 11, 1924, and which is overruled by the Court. This motion is for a new trial upon the first count of the first cause of action and being the plaintiff's claim for the injuries and damages arising to Lewis Goodyear during his life time. Thereupon, the plaintiff presents her motion No. 6 and which was filed on the 11th day of November, 1924, and which asks for a new trial upon the second cause of action and which is overruled by the Court. Said second cause of action being under the Kansas Workmen's Compensation Act.

Thereupon, the court rendered judgment in accordance with the verdict returned by the jury.

It is therefore ordered adjudged and decreed by the court that the plaintiff have and recover judgment upon the first cause of action as against the defendant in the sum of $5000.00, with interest thereon from this 14th day of November, 1924, at 6 per cent per annum and for the costs of this action, taxed at $.....; and that the defendant recover judgment as against the plaintiff upon her second cause of action as set out in the petition.

John C. Hogin, Judge.

Filed Nov. 25, 1924.

Thereafter, on March 16, 1925, appellant served upon attorneys for appellee his notice of appeal, the same was acknowledged by appellee on said date and was filed with the Clerk of the District Court on March 17, 1925, which notice of appeal is as follows:

NOTICE OF APPEAL.

To Louisa Goodyear, Administratrix of the Estate of Lewis Goodyear, Deceased, and N. J. Ward and John F. McClure, Her Attorneys of Record:

You are each hereby notified that the defendant above named intends to and does hereby appeal to the Supreme Court of the State of Kansas, from all rulings, orders, decisions and judgments, and findings of the above-entitled court adverse to said defendant, made and entered of record by and in said court in this action.

Dated this *14th* day of March, 1925.

Luther Burns,
J. E. DuMars,
W. D. Vance,
Attorneys for Defendant.

Service of the foregoing notice is hereby acknowledged to have been made upon us this 16th day of March, 1925.

N. J. Ward and
J. F. McClure,
Attorneys for Plaintiff.

CERTIFICATE.

The foregoing is a true and correct abstract of the record in the above entitled case so far as it is necessary to present the questions for review.

LUTHER BURNS.
J. E. DeMARS.
W. D. VANCE.
Attorneys for Appellant.

SPECIFICATIONS OF ERROR

1. The court erred in refusing to render judgment in favor of appellant upon the special findings of fact, made and returned by the jury, as requested by appellant.

2. The court erred in refusing to render judgment in favor of appellant, notwithstanding the verdict of the jury, as requested by the appellant.

3. The court erred in refusing to give to the jury the following numbered instructions requested by appellant: four, five, six, ten and seventeen.

4. The court erred in giving to the jury the following numbered instructions: eight, nine, forty-eight and forty-nine.

5. The instructions given to the jury as the law of the case, and complained of herein, are contrary to Section 10, Article I of the Constitution of the United States in that the same impair the obligation of the contract of settlement entered into between appellant and Lewis Goodyear.

6. The court erred in overruling appellant's motion for a new trial.

7. The court erred in rendering judgment in favor of appellee and against appellant.

LUTHER BURNS,
J. E. DeMARS,
W. D. VANCE,
Attorneys for Appellant.

APPENDIX TO ABSTRACT.

There was a former trial of this case May 12th to 20th, 1922, resulting in a verdict in favor of the defendant (now appellant) and special findings in his favor, as well as judgment in his favor. This judgment was reversed on appeal (114 Kan. 557) and the case remanded for a new trial under a novel construction of the Federal Employers' Liability Act to the effect that a settlement made by an injured employe after the injury and prior to his death was not a bar to an action by a personal representative for the benefit of dependents for the death, if it resulted from the injury, as there was a distinct and separate right of action that remained in existence somewhere until the man died which could not be released during the lifetime of the injured employe. This renders it impossible to make a valid settlement during the lifetime of the injured employe. Inasmuch as there was no final judgment, as the case was remanded, no appeal could be taken or application made for certiorari to the United States Supreme Court

and it became necessary to go through the form of another jury trial. The questions involved in this appeal are so important and so interwoven with the former appeal that we are compelled to ask the court in this case to reconsider the entire question and to overrule its former decision in 114 Kan. 557. For the information of the court and for ready reference, we attach the following appendix to the abstract showing answers to special questions, verdict and judgment at the former trial:

SPECIAL QUESTIONS SUBMITTED TO JURY

(First trial.)

1. Did Lewis Gosslyear on or about March 12, 1920, go to the Rock Island Hotel and there meet B. H. Stiers and agree upon terms of a settlement for injuries sustained July 31, 1919?

Ans. Yes.

2. Did B. H. Stiers as Claim Agent, representing the Director General of Railroads on or about March 16, 1920, deliver to Lewis Gosslyear at the residence of the latter in Belleville a check for $1135.00, and at the same time receive from the said Lewis Gosslyear a release in full settlement and satisfaction for all injuries sustained by said Gosslyear on July 31, 1919?

Ans. Yes.

3. Did Lewis Gosslyear make any statement to Dr. Thomas during the month of March, before the date of settlement with the Claim Agent of defendant, as to his suffering any pain in his side or back?

Ans. No.

4. Did the defendant railway through its agent or agents commit or perpetrate any fraud upon Lewis Goodyear?

Ans. No.

5. If you find that the agents of the defendant company committed a fraud in connection with the settlement with Lewis Goodyear, state specifically of what such fraud consisted?

Answer: .....

6. Did Lewis Goodyear receive $1135.00 from the defendant?

Ans. Yes.

VERDICT.

(First Trial.)

We, the jury empanelled and sworn in the above entitled case, do upon our oaths find for the defendant and against the plaintiff upon the plaintiff's second cause of action; and we further find for the defendant and against the plaintiff upon the plaintiff's first cause of action.

Filed May 20, 1922.

JOURNAL.

(First Trial.)

Now on this 12th day of May, 1922, said date being one of the days of the regular May, 1922, term of the above entitled court, this cause comes on for hearing and trial, the plaintiff appearing by her attorneys, N. J. Ward and J. F. McClure, and the defendant appearing by his attorneys, W. D. Vance and J. E. DuMars. Thereupon the jury is duly empaneled and sworn to try this cause. The plaintiff introduces

evidence until May 16, 1922, at which time the plaintiff rests. Thereupon the defendant demurs to the first and second causes of action. Thereupon the court sustains the demurrer as to the second cause of action and overrules the demurrer as to the first cause of action.

Thereupon the defendant offers evidence until May 18th, 1922, at which time both parties rest their case.

Thereupon on the 18th day of May, 1922, the court instructs the jury in writing, and the attorneys argue said case to the jury.

Thereupon on the 20th day of May, 1922, the jury return into court with a verdict and answers to the special questions, and thereupon the jury is discharged.

Thereupon on the 31st day of May, 1922, said parties appearing as before, this cause comes on for hearing upon the plaintiff's motion for a new trial, which is overruled by the court.

It is therefore ordered and adjudged by the court that the defendant recover his cost against the plaintiff taxed at $.....

Caption omitted

IN SUPREME COURT OF KANSAS

No. 26347

[Title omitted]

Abstract of Appellee—Filed February 1, 1926

STATEMENT

The abstract and brief of the appellant are based upon the claimed errors of the trial court in submitting a portion of this case to the jury with instructions to not consider the release in relation thereto. The petition (Appellant's Abst., 2) is for the recovery of damages upon two counts, and upon two alternative causes of action. The first cause of action is under the Federal Liability Act, and the second cause of action is under the Kansas Workmen's Compensation Act. The case was tried under the Federal Liability Act, and the appellant has only set forth that cause of action in his abstract, which is termed the first cause of action. The second cause of action, being that alternative cause upon the Workmen's Compensation Act, is not abstracted by the appellant, nor will it be by the appellee, because the facts show that the injury was received when duties were being performed in relation to an inter-state train. The petition sets forth two counts, one for recovery of damages arising to the deceased before his death, and the other setting forth a claim for damages arising after his death, and because thereof. The pleadings are exactly the same as they were when this case was before this court upon a former appeal. See Goodyear Vs. Railway Company, 114 Kan. 557. In that decision this court pointed out that there were the two counts for damages. The jury found, against the plaintiff upon the first count, by reason of a release given by Lewis Goodyear during his life time; but, the jury found for the plaintiff upon the second count, being the damages arising to the plaintiff because of the

loss of support to her and the dependents represented by her. The appellant has appealed, and bases the appeal upon the findings of the jury and instructions of the court. The appellee has filed a cross-appeal and finds it necessary to present an abstract of the evidence in order to properly present the errors claimed by both parties. There is no material difference in the testimony in this case than what it was in the first trial and the legal questions are the same.

A number of instructions were requested by the plaintiff and all of which were refused, except No. 13. Only a part of them will be presented as being material on this appeal; those not presented relate to the negligence of the defendant and the consequent damages, but do not in anywise deal with the matters concerning which requests were made, as follows:

PLAINTIFF'S REQUESTED INSTRUCTIONS TO JURY

6. The jury is instructed that if Lewis Goodyear was injured by the negligence of the defendant, or any of his agents, servants or employees, that the said Lewis Goodyear, during his life time was entitled to such damages as would compensate him for all his expense in caring for his injuries and that he was also entitled to compensation for the loss of time and diminished earning power; and was entitled to compensation for his pain and suffering endured during his life time. And that if you find Lewis Goodyear died before he was paid for all his damages accruing during his life time, that there survived to this plaintiff a right action to recover therefor. And if you find Lewis Goodyear was partly compensated for his damages accruing in his life time, that such sum as was paid him should be applied upon any sum you find would compensate for such expenses, loss of time and diminished earning power, and pain and suffering. That the damages covered by this instruction are those which arose or accrued during the life time of Lewis Goodyear and for which he was entitled to recover for such sum as would compensate for such damages, caused by the negligence of the defendant, even though you further find that Lewis Goodyear did not die as a result of the negligence of the defendant.

7. a. As to those damages, explained in the preceding instructions, and arising before the death of Lewis Goodyear and for which he might have recovered, the said Lewis Goodyear could make settlement and give a release therefor. And Lewis Goodyear did make settlement, and give a release therefor. The plaintiff admits the execution of such release, but claims that such release resulted from the mental incapacity of the said Lewis Goodyear, or as a result of fraud or mutual mistake. But such release has nothing to do with those damages arising after death, as explained in these instructions.

7 b. If Lewis Goodyear died as a result of the injuries received on July 31, 1919, then the facts admit that there was a mutual mistake on the part of the said Lewis Goodyear and the representatives of the defendant, and for this reason the release does no apply as to any of the damages involved in this action.

8. The jury is instructed, that the release relied upon by the defendant will not prevent recovery herein upon any of her causes of action or claims if you find from the evidence that such release was procured at a time when the said Lewis Goodyear was mentally incapable of understanding the effect of the provisions of such release and of its conditions and terms, or if said release was procured by fraud, or as a result of a mutual mistake on the part of Lewis Goodyear and of any of the representatives of the defendant.

9. The jury is instructed, that it would be sufficient fraud for you to disregard the release, if you find from the evidence that at the time it was signed by Lewis Goodyear, that he was lead to believe by any agent, servant or physican of the defendant that he was materially recovered from the injuries and that he would soon be able to resume his former work with the defendant; and that such agent, servant or physician at that time, knew, or should have known, that the said Lewis Goodyear had not so recovered, and you also find that the said Lewis Goodyear relied upon such information and because thereof executed the release.

10. The jury is instructed, that the release should also be disregarded, if you find from the evidence that said release

was signed by Lewis Goodyear because of mistaken belief on his part and because of a mistaken belief on the part of any agent, servant, employee or physician of said railway or of the defendant; that the material results of the injuries received on July 31, 1919, had disappeared.

11. The jury is instructed, that Dr. Thomas was at all times concerned herein the physician of the defendant, and B. H. Stiers was the agent of the defendant, and that the defendant is bound by any statements or representations by them or beliefs of them or either of them. And if you find at the time Goodyear signed the release that the material results of his injuries had not disappeared so that Goodyear would soon again be able to resume his work and you also find that both, Lewis Goodyear, and either an agent or physician, or both, believed that the material results of the injuries received on July 31, 1919, had disappeared, so that Lewis Goodyear would soon again be able to resume his work as car inspector, then you should entirely disregard the release, for such is, in law, a mutual mistake of the parties.

12. The jury is instructed, that if you find the plaintiff is entitled to recover for the damages accruing to Lewis Goodyear before his death, then you are to allow such a sum that you find would compensate for his loss of time and diminished earning capacity during his life time, and also allow such a sum as would compensate him for his pain and suffering endured, and then deduct therefrom such sum as you find the defendant has already paid.

13. The jury is instructed, that if you allow damages for pain and suffering, then the plaintiff would be entitled to recover because of such physical pain and mental suffering from date of his injury until his death.

14. The jury is instructed that if you find that the injuries received by Lewis Goodyear on July 31, 1919, caused the death of Lewis Goodyear, then you are to disregard the release and the plaintiff is entitled to recover such sum as you find will compensate her and any children that were dependent upon Lewis Goodyear at his death; and in determining such compensation you shall allow such a sum as will be compensation and pay for the pecuniary losses, the

plaintiff and all dependent children have sustained or will sustain by reason of the death of Lewis Goodyear. And in considering and in estimating such pecuniary loss, you shall consider the age of Lewis Goodyear at his death, together with his capacity for earning money had he not been injured so as to cause his death; you are also to consider the disposition of Lewis Goodyear to contribute, care for, and furnish his wife and dependents with money and support. And you are also to consider the age of those dependent upon him and probable expectations of life of Lewis Goodyear, and of those dependant upon him, also expenses of funeral and burial. And in determining the damages arising after death you are not to take into consideration the damages arising before death or the release given by Lewis Goodyear; but you are to allow damages arising after death, because of the money loss to the plaintiff and to those dependent upon Lewis Goodyear, brought about by the death of Lewis Goodyear.

MOTION TO SET ASIDE FINDINGS OF JURY—Filed November 11, 1924

No. 4

No. 1. Plaintiff asks that finding No. 1 be set aside for the reason that it is contrary to the evidence and resulted from incorrect instructions.

No. 2. Plaintiff asks that finding No. 3 be set aside for the reason that it is contrary to the evidence and resulted from incorrect instructions.

No. 3. Plaintiff asks that the whole of finding No. 5 be set aside for the reason that it is contrary to the evidence; for the further reason the Court did not correctly instruct as to mutual mistake and for the further reason that the general finding of the jury shows there was a mutual mistake when the release was entered into.

No. 4. Plaintiff asks that the whole of finding No. 6 be set aside for the reason that it is contrary to the evidence; for the further reason the Court did not clearly instruct as to mutual mistake and for the further reason that the gen-

eral finding of the jury shows there was a mutual mistake when the release was entered into.

No. 5. Plaintiff asks that subdivision (a) of No. 6 be set aside for the reason that it is an improper question and contrary to the evidence and resulted from incorrect instructions and is contrary to the general verdict.

No. 6. Plaintiff asks that subdivision (b) of No. 6 be set aside for the reason that it is an improper question and contrary to the evidence and resulted from incorrect instructions and is contrary to the general verdict.

No. 7. Plaintiff asks that finding No. 7 be set aside because it is contrary to the evidence and resulted from incorrect instructions and is contrary to the general verdict returned by the jury.

MOTION FOR NEW TRIAL—Filed November 11, 1924

No. 5

Now comes the plaintiff and asks the Court to grant a new trial upon the first count of the first cause of action, which is for damages for the injuries sustained by Lewis Goodyear during his life time and being the damages arising before the death of the said Lewis Goodyear for the following reasons:

1. No. 1. Because of abuse of discretion of the Court.

No. 2. Because of erroneous instructions of the Court in relation to such claims.

No. 3. Because of the failure of the Court to correctly instruct the jury upon the question of mutual mistake.

No. 4. Because of failure of the Court to give the instructions requested by the plaintiff in relation to such injuries and damages.

No. 5. That the verdict of the jury is contrary to the evidence in respect to such injuries and damages, arising before the death of Lewis Goodyear.

No. 6. Because of newly discovered evidence, material to the plaintiff which he could not with reasonable diligence

discover and produce at the trial. This plaintiff does not ask nor seek a new trial upon the issues pertaining to the damages arising after the death of Lewis Goodyear.

MOTION FOR NEW TRIAL—Filed November 11, 1924

No. 6

Now comes the plaintiff and asks the Court to grant a new trial upon the second cause of action set forth in the plaintiff's petition on file, for the reason that the demurrer to the evidence was improperly sustained in relation thereto and for the further reason that the Court improperly instructed the jury to return a verdict in favor of the defendant as against the plaintiff upon such cause of action.

DEFENDANT'S EXHIBIT 7

In the case of accident to Lewis Goodyear, a car inspector, at or near Belleville, Kansas.

Date: July 31st, 1919; hour: 6.12 *M.* M.

Statement of Lewis Goodyear

Made to R. H. Stiers, at Belleville, Kansas, on the 2nd Day of Aug., 1919, in the Presence of Undersigned

My name, Lewis Goodyear; age, 64 years. I reside at Belleville, Kansas. I am a car inspector. Married.

I am employed by the Rock Island as car inspector at Belleville, Kans.; have been so employed for the past 12 years, have been in the employ of the Rock Island as section laborer, coach cleaner and car inspector for the past 16 years. I was working as car inspector on the 31st of July, when I met with an accident. I had inspected train No. 25 Kans. City section and was standing at the west end of this train over near Neb. main line waiting for No. 5 Chicago section to come in. I saw the trucks lined up there for No. 5 and they looked the same as always. I did not pay any attention to them, except saw them standing there as usual,

saw No. 5 coming in with unusual speed and saw that they were going down farther than usual, so I turned out around the truck that was to the west as I was standing between the middle truck and the truck to west, was walking down the platform between the K. C. main line and Neb. main line walking west to where I thought the front end would stop when I was struck in the back by truck, this truck was struck by engine of No. 5 as it passed it and truck was thrown or shoved to the west, truck struck me in back on right side and knocked me down, the truck went to the west and south and it shoved me along ahead of it and rolled me about 20 to 25 feet. I was badly bruised all over the body, had two ribs broken on right side and I was cut and bruised from head to feet. I have cuts and bruises all over my body and I cannot stir without great pain as I was rolled under truck on the gravel platform for about 20 to 25 feet. I did not notice that the truck was standing out too far, but saw the trucks there and they looked to be in the clear as I see them there every night.

Train No. 5 came into the station at the rate of at least 15 miles per hour on this night, all together too fast for a place like this as the room between tracks is too close as it is almost impossible to get through with so many trucks standing along side trains when they are being worked.

I do not remember much what happened after being struck except that I was being rolled, I was picked up by some men and the truck taken off from over me, was carried to the baggage room and sent home.

I was earning 58c per hour at the work that I was doing, working 8 hours per day, earning $4.64 per day. I will expect the Rock Island to pay me for the time that I will loose and all my expenses account this injury to me as it was no fault of mine. I do not know at this time just how long I will be laid up, if there is no permanent injury to me I will expect the Company to pay me for time that I will loose but if there is anything turns up that will injure me permanently I will expect the Company to pay me for that disability.

When I am able to return to work if ever I will then let them know what I want at that time, all I want is what is fair to me and the Company.

Lewis Goodyear, by Mary Goodyear, at his request.

Chas. H. Goodyear, B. H. Stiers.

PLAINTIFF'S EVIDENCE

D. L. MACHAMER: Saw Mr. Goodyear receive his injuries on July 31, 1919, when the Rock Island passenger train, No. 5, came in from Chicago on its way to Denver, and saw the trucks loaded with baggage standing by the tracks. Mr. Goodyear was thirty to forty feet west of the truck that was thrown against him. The train came in about thirty miles an hour. The pilot of the engine struck a truck loaded with baggage and lifted it in the air and threw it on top of Mr. Goodyear and carried Goodyear about twenty feet. Mr. Goodyear was taken to the baggage room. He was bruised and cut, and in a semi-conscious condition, and complained of his chest paining him. He did not see Mr. Goodyear after that until he came down town several months later. Previous to these injuries, he apparently was in good health, worked every day. After these injuries he did not look very good, would assist himself with a cane, and he was in a bad condition. He was in a weakened condition and was limping (5 22).

A. O. EMERICK: Was with Mr. Machamer at the time Mr. Goodyear received his injury on the 31st day of July, 1919, and was standing so he could see what happened as the train came in by the depot. He heard the crash and looking around, saw this truck as it hit the ground and Mr. Goodyear was under it and rolling. This was a passenger train of six or seven coaches. Came in around twenty-five to thirty miles an hour. It was a baggage truck that was struck and that hit Mr. Goodyear. Two or three months after this, he saw Mr. Goodyear on the streets and looked like a man, just got up out of a severe sick spell (23 32).

HOWARD TOWLE: Was at the depot the last of July, 1919, when a truck was hit by a passenger train, No. 5, and Mr. Goodyear was struck by it, and was at the west end of the depot and saw trucks lined up there. This train starts at Chicago and goes to Colorado. The first thing he saw was the train striking the truck and then the truck strik-

ing Mr. Goodyear, and they took Mr. Goodyear out from under the truck. His face looked bad, with bruises and he was groaning and he was all over with cinders. That he was frequently at the depot previous to the injury, as he carried the mail, and knew the duties that Mr. Goodyear performed. Saw him examine the air hose and examine the trains as they came in, for hot boxes and such as that. It may have been steam hose, and so on with general inspection of the train. That trucks were lined up by the track, that was the usual place. This was done by the baggage men or the express men (32-40).

Bert Ainsworth: Saw this pasenger train, No. 5, come in and strike the truck which was thrown into the air and then striking Mr. Goodyear as it came down (37).

Ferdinand Hallock: Knew Mr. Goodyear many years and lived near him, and was an employee of the Rock Island at the time Mr. Goodyear was injured and while he worked for the railroad, and knew him as a car inspector, and saw him perform the following duties, as to freight trains: go around the trains and examine the box cars and a number of other things, testing the air, uncoupling the engine, pack the boxes when found any of them hot, fixed steam leaks. If it was a passenger train, he did the same things while standing in front of the depot and used a hammer to help him. He knew Mr Goodyear since 1905, and from that time until he was hurt, and worked every day in the week, including Sunday, and laid off only for a few days of rest, like everybody else. At first he worked ten to eleven hours a day, and then eight hours a day. He was never sick, except hay fever in the fall, when his eyes watered and were red, and never laid off on account of this hay fever. After Mr. Goodyear was injured, he came to see him, and he was all bruises and black and blue and was suffering. Later on he saw him in the railroad yards, and he was weak and would walk just a few steps and would stop to catch his breath, and said he could not go no where without his breath bothering him and that he could not breathe.

Before these injuries, the witness never noticed him having any difficulty with his breathing. That he never heard of him being laid off on account of illness, but laid off to rest (49-57).

Mary Goodyear: A daughter of the age of twenty-six years, said her father died May 4, 1920, and that she and her younger sister, Esther, were living at home with their father at the time of his death. Before he was injured on July 31, 1919, her father had been car inspector for the Rock Island, and worked seven days a week, and her father always had good health. He was sixty-five years of age at his death. In years past he had had hay fever a few days in August, but the year before he received his injury he had not had the hay fever. He earned about $150.00 a month. He was brought home about six o'clock the evening he was injured, and he was bruised all over his right side, and complained of his right side and his breathing (57-61). Dr. Thomas came the next day and treated him for fractured ribs on the right side and towards the back, at which place there were bruises. That these bruises on his back never entirely cleared up. He was in bed six weeks to two months, and then sat around the house she helped him, and continued to suffer pain on the right side and his knee. When he started to move around he had trouble in breathing, just gasped for breath, and from the time of the injury until his death, he was never free from that difficulty in his breathing, but previous to this injury he never had this difficulty. About two months after injury, he first got out of the house in the yard. (61-67.) Later on, walked to the doctor's office; he walked with a cane. It was very difficult and he could not talk when walking, because he could not get his breath and would have to stop several times on the way down town and get his breath. This continued until he went to his bed the last time which was about two months before his death. He never did any work after his injury. He always had trouble getting up and down in his chair. In February after his injury he began to talk about going to work the first of March (67-76).

She was present when Mr. Stiers, the Company agent, made a settlement with her father. She heard her father

state he was able to transact business, but did not feel able to get down to the hotel. This was over the telephone to Mr. Stiers. Then Mr. Stiers came in. At this time her father was worse than usual and that night her father went to bed and did not get up any more until his death, and had a bad night and considerably worse the next day, and his breath was always bad and he always complained about his right side and his breathing. At times he was very bad and did not know people. This was several weeks before he died. She was twenty years old when her father was injured (71-76). In cross examination she testified that before her father worked for the Rock Island, he had a spell of sickness. That her father never walked without a cane after the injury. Her father complained of his injury to his side as being towards the back. She cashed the draft that was given in the settlement. The release was shown the witness and she identified the following words there, being in the hand-writing of her mother. "I have read the above and understand the same to be a release" (76-96).

Redirect examination:

The witness has a sister who was twenty-one years old at the time of the trial, who is not in good health, and has been poor all her life, and is not able to do hard work, and at the time of her father's injury, the family had no source of income, other than his wages. Her father began hoping to be able to go back to work as soon as he was up and around, and stated that he decided to go back to work the 1st of March. At the time Mr. Stiers was there and made the settlement, they talked about him going back to work, and they talked about him having planned to go to work March 1st, and Mr. Stiers talked about the settlement as being to the 1st of March from the time he was injured (96-105).

That Dr. Thomas took care of her father from the first and he was the railroad doctor, and between the time of the injury and before her father went to bed in his last sickness, which last sickness began when the settlement was made with Mr. Stiers. Dr. Thomas told her at different times that he thought her father would get well and would

be able to go back to work. Also during this time, she heard her father say several times he thought he would be able to go to work, and that March 1st was fixed as the time when he expected to go back to work. This date was fixed about a month before that time. But her father did not go back to work at any time (222-225). That these statements were made by Dr. Thomas at his office when she paid lodge dues once a month (235-236).

Esther Goodyear: Was twenty-one years of age at the time of the trial and had gotten to the sixth grade in school and had not gone to school for five years, and always lived with her folks and can only do light work around the house, and has trouble with her walking and is ruptured, and is unable to go out and work for anybody or to earn any money for herself. She saw her father when he was brought home, injured, and he was bruised on his face and body and he was in bed for something like two weeks and then was around the house when helped. He never could breathe after he was injured until his death as he had before, and never was sick before he was injured, and worked every day. After he went outside he could not walk without stopping, because of his breathing. He never was able to work after his injury (105-114).

The following neighbors testified of knowing Mr. Goodyear before and after his injury, and testified as to his good health before his injury, and as to working every day and having no difficulty with his breathing or walking; but after his injuries he could not walk any distance without stopping because of shortness of breath. He complained of his breathing and complained of his back and side until his death: Mrs. Gloma Turner (114-121), Mrs. Anna Webb (199-220), Mrs. Clara Riddick (225-228), James Verley (146-152), Mrs. Noah Field (238-241), Anna Cottral (244-246).

Mrs. CHARLIE GOODYEAR: Is a daughter in law and knew Mr. Goodyear since 1909, and previous to his injury in 1919 he was well for a man of his age. She saw him about four weeks after his injury and he was in a weakened condition. It was hard for him to talk and he had difficulty in breathing, and was taped mostly on his back because of fractured ribs. She saw him at other times through the winter, and he continued about the same. She saw him in February, and went with him to Fairbury to see Dr. Lynch about his knee. This trip to Fairbury was in November and it was hard for him to walk, and his breathing was labored, and when he walked he would go a short distance and would have to stop and rest (133-146).

LEWIS GOODYEAR: A son; testified he was in the army when his father was injured, and prior to that, always had had good health, being sick only once in 1905 or 1906, and worked regularly. He returned from the army October 6, 1919, and his father was in bed and hardly recognized him when he first came in, and did not seem to know very much what was going on, and in a week or two the witness left again, and did not return until about Christmas time, at which time his father was up and around, and could not get around very well and was bothered with his knee and complained of his side and chest hurting him, and did not look healthy, and complained about his breathing. He walked with his father up town a few times, and he walked slow and had to stop every block or so and rest because he was short of breath and was weak physically, but seemed to get around a little better after a while. He heard his father planning about going back to work the 1st of March, and heard this talk in February, but he never did go back to work or never did anything after receiving these injuries. The witness brought Mr. Stiers to the home at the time the settlement was made because his father was not able to go to the hotel. He heard the talk between his father and Mr. Stiers, and they were figuring wages. "How much he had been earning and what he would have earned if he had been working, so much each month." He heard the amount as $1,135. "It was to cover the loss of time,

that is what money that he would have made had he been working during this time instead of being laid up." He also heard his father say that he wanted to go back to work the 1st of March. He did not see his mother or any of the family read or examine the release. At the time Mr. Stiers was there and made the settlement his father had been in bed and could not get out that day, and did not leave the place after that and got down sick a short time after that and never did get up any more (156 169).

In cross examination he said that at the time of settlement his father and Mr. Stiers figured wages and his father had a little book in which he kept his time (169 179).

STIPULATION AS TO CERTAIN FACTS

It was agreed between the parties that Louisa Goodyear was, at the time of institution of this action and at the time of trial, the duly appointed and acting administratrix of the estate of Lewis Goodyear, deceased, and was duly qualified therefor (180).

FRED BLECHA: Was a car inspector for the Rock Island at the time Lewis Goodyear was injured, and before that time, and was working at the time at the back end of the same train, and had known Mr. Goodyear since 1912, and did not recall of Mr. Goodyear laying off until he was injured, and laid off only as railroad men do, and never knew of him being sick before the injury, but was an active man and could get around the trains in good shape. He saw him at different times, after he was injured at the home, and saw him up town once or twice, and he did not appear very well. That train No. 5 came from Chicago, through Council Bluffs, and through Illinois, Iowa, Nebraska, and to Belleville, and then to Denver, Colorado. The car inspector had nothing to do with the baggage or express trucks, but did have to do with the switching and inspecting. That is cut the air and released the brakes, and then the switchmen took care of the train (156 198).

LOUISA GOODYEAR, the plaintiff in the action, testifies that she was the widow of Lewis Goodyear, deceased, and there are seven living children, of which two are living at home. Her husband died May 4, 1920, at which time there were five living at home. Her husband had worked for the Rock Island since about 1906 until injured, and preceding this injury had never had any illness, but did have hay fever in the latter part of August for about two or three weeks, but never laid off work on that account. Dr. Thomas treated her husband after his injuries and set his ribs the second day after injured, but he was flat on his back for three weeks, and then sat up in bed, and then in a chair, and after four weeks he was out of bed. After these injuries his breathing was very bad, but he had never been troubled that way before and never was well from the time of his injuries until his death. She was present when the release was signed. She identified a check to Dr. Munford for his services for Mr. Goodyear for his last sickness. This check was admitted in evidence (248-258).

In cross examination, she testified that she knew Mr. Stiers called on the 'phone and wanted Mr. Goodyear to come to the hotel and she told Mr. Stiers that Mr. Goodyear could not come down, and then Mr. Goodyear went to the 'phone. Her husband had said that he had met Mr. Stiers and discussed with him a settlement, and said that he wanted to make a settlement so that he could go back to work. That she knew her husband and Mr. Stiers made some kind of a settlement, but did not understand what it was at the time and that her husband was not well at the time (258-269).

C. A. MCMULLAN: Had known Mr. Goodyear since about 1907 or 1908, and that before he received these injuries, he was a healthy man of his age, and after his injuries he looked pale and weak physically, and that he breathed hard. The last time he saw him was just before his last sickness (269-274).

HAROLD RISSTEN: Testified that he saw the pilot beam of the engine hit a truck and lifted it off the ground and it struck Mr. Goodyear. At the time Mr. Goodyear was

walking along towards the West, the same direction the train was going, near the track, as the train came in. The tracks were there to take care of the baggage and mail from No. 5 (27-32, First Transcript).

Charles Goodyear: Testified that he was an employee of the Rock Island and saw his father two or three days after he was injured, and that he was in bad shape. That after the accident that he saw him about every two or three weeks and that his father when talking, would talk on one subject a while and then switch off to another, and this gradually grew worse through the winter. He walked at different times with his father, after the accident and he could not walk very far before he would have to stop and rest, but never noticed this difficulty before the accident (84-89, First Transcript.)

Lloyd Johnson: Said he knew Mr. Goodyear before the injury and afterwards. That he was an able bodied man before, but after he was quite pale and used to limp some as he walked. He saw him in the winter, possibly in January, in the railroad yards, and Mr. Goodyear thought he would be able to go back to work after while (230-235).

Mrs. John Linnquist: Knew Mr. Goodyear many years before his injury, and saw him at least three times afterwards. Before his injury he was a healthy looking man and had no difficulty with his breathing. In February, 1920, she walked with him along on the street, and he appeared to look like a sick man and had trouble in walking. "The first was, it hurt in his back and in his side; he was very short of breath; he could not walk but a short distance but would have to stop and get his breath; his breath was so bad." At this time she asked him how he was feeling. "And he said that he thought he would try to go to work. And I told him I did not think he looked like he was able

to go to work; and he said sometimes people go to work that are not able; he said if his breathing got better, that he would be able in a little while; I said you can't be all right. He said, I am going to consider it. He went on talking and I told him I didn't think he ought to try to go back to work, but he said he might try it" (121-129).

Dr. R. H. Mumford: Testified that he was a physician and surgeon, and his qualifications as such were admitted by the defendant. He had practiced since 1907. He was called to attend Lewis Goodyear year on April 12, 1920, and continued to treat him until his death, and then assisted in an autopsy. During this time had a fever and his pulse was rapid and his respiration was above normal. A thorough examination found a dullness in the chest and then aspirated him by using a needle large enough to draw the fluid. The fluid from the left side was not septic. The aspiration of the right side produced nothing the first time. He was a very sick man at that time. The next day the left side was improved, but the right side had the same dullness with no improvement. The patient improved some for about a week with the left side improving and the right side growing worse (278-287). The second time that the chest was aspirated was the 21st of April, on both sides of the chest. These aspirations were conducted as physicians do, in the back and into the chest cavity. The second time a little fluid was obtained from the left side and it was non-septic, but nothing could be obtained from the right side, although its condition indicated that there was fluid there. His heart and breathing continued rapid and he had fever. The third time that aspiration was used, was a few days before Mr. Goodyear's death on the 4th day of May, 1920. At this time the left side had cleared up and no fluid was obtained. The place of aspiration on the right side was varied between the eighth and ninth ribs, which was below the former aspirations, and obtained a few ounces of fluid, in which was tissue and serum, which indicated a tearing down of the tissue and indicated an abnormal condition. His general condition was worse and he was

drowsy (287-295). An autopsy was held the afternoon after Mr. Goodyear died, and there attended Dr. Kamp, now deceased, Dr. Thomas, and the witness. The chest and abdomen was opened and the left side found in a not abnormal condition. On the right side, the lung and pleura were adherent to the chest wall. The adhesions, which indicated an abnormal condition, extended pretty well upon the front side and clear around to the back. These were firm, strong adhesions, caused by inflammation. Such adhesions usually take several months to form. Around the adhesions was found heavy thick cellular mass. In the center of that we found a cavity with quite a thick fluid with some blood in it. This was well back on the right side. This would indicate that the primary cause was at the seat of this fluid. There was pus in this fluid, which requires it to be taken care of through mechanical means or through nature, or it eventually proves fatal. He found a roughened condition of the two ribs which indicated that they had been fractured, which fractures were at the place where was found the pocket of pus and the gelatinous mass was around the pus, and the adhesions were around all (295-303). The witness was asked what caused an inflammation that produced such adhesions, and he answered, "Different diseases, injuries, traumatism." He defined traumatism as a medical term for a blow, hard pressure or something of external violence. His opinion was that a violent blow would have caused the condition that he found in Mr. Goodyear. The doctor testified that he made the death report in this case and that the cause was traumatic pleurisy. In explanation thereof said his reason for such a statement was, that he found nothing on the left side to cause his death, and the condition on the right side, the injuries received by Mr. Goodyear indicated traumatic pleurisy. The death report also gave acute dyspnea which the doctor said meant difficult breathing, and that hyperthrophiad heard meant enlarged heart. The witness explained that this difficult breathing was caused by the lack of breathing space, which he found to exist; and that the enlarged heart was caused by overwork on the heart; and that this was caused because of the lack of breathing space, restricted circulation, and toxæmia, from absorption of matter in this

mass on the right side, which caused the weakened condition of the heart muscle, as well as overworked it. The doctor found no other condition that would have caused the illness or death of Mr. Goodyear (303-309).

In cross examination, the doctor testified that a man struck by some object sufficiently violent to fracture two of his ribs and injure the pleural membrane would cause pleurisy, which would cause difficult breathing and pain, and if the pleurisy is extensive enough, becomes purleant pleurisy, and eventually will prove fatal. That he had known cases of pleurisy which have recurred over a space of a year or two, and then die from injury. The witness explained the fluid on the left side as a result of the age and sickness of Mr. Goodyear, and that he did not think the condition on the left side had anything to do with the condition on the right side. That the adhesions around this fluid had formed connective tissue, which takes a period of time to form. That an enlarged heart might be of months or years duration, and might be only weeks or a few weeks duration. Further, explaining how toxaemia would cause the heart to beat faster, the doctor said, "If this pathological condition was more than nature could take care of, that the heart would beat faster so as to try to do it" (309-341). That the condition of the heart was one of the causes of death. But the condition was not what is termed Angina Pectoris. That there was a difference of opinion between him and Dr. Thomas, not as to the conditions found at the autopsy, but as to cause of death. That Dr. Thomas never gave him any cause. That in his opinion, the principal causes of death were Traumatic Pleurisy and Hypertrophied heart (341-351).

Redirect examination:

The witness said that if Mr. Goodyear had asthma before his injury, that the injuries would certainly aggravate his physical condition and the injury would contribute to his death. That he found no indications of flu, and heard nothing about flu. In further explaining his opinion, the doctor said, Traumatic Pleurisy of itself would not cause death; but death within a short time could result because of complications from an injury of this nature, and be one of the principal causes of this man's death. And

that, the injuries caused the pleurisy which later developed into an abscess which in his opinion produced this man's death. That fractured ribs might puncture the pleura wall and thus cause pleurisy, and might cause rupture of the blood vessels, and if not absorbed and finally became septic would cause an abscess, with fever and rapid pulse, and the poison must be gotten out of the system or it would produce death. That the accumulation of the extraneous matter, such as found in Mr. Goodyear would make the breathing more rapid because of over action of the heart, and the restricted breathing space. That an enlarged heart no larger than Mr. Goodyear's with no other cause should not kill him (351-359).

In re-cross examination, the doctor said that the two causes of death were the heart condition and the pleuritic condition, the latter he traced back to the injury, and which was caused by an inflammation as a result of the injury, which inflammation could result from a puncture by the broken ribs or injury to the tissues without puncturing the membranes (351-364).

Anna Wood: Had been a neighbor of Lewis Goodyear for about twenty-one years and before his injuries never knew of him being sick, and that he regularly worked, but sometimes would have hay fever towards the fall of the year. After his injuries he told the witness of his sufferings and he had trouble getting up and down. In February, he was figuring on going back to work in, perhaps a week or so, about the 1st of March, and said he was going to settle up with the company. At this time, he was not strong nor well. That he finally went to bed about the 1st of March. He told her that he expected to make settlement for his wages (199-221).

Dr. W. L. McFarland: Treated Mr. Goodyear in 1906 for acute nephritis from April 4th to April 12th, 1906, and he had no knowledge whatever of it recurring. In cross examination, the doctor testified that acute nephritis may not become chronic, and it is not a common thing for acute nephritis to recur (364-376).

Defendant's Evidence

The defendant called a number a witnesses who had worked with Mr. Goodyear before and after his injury, some of which testified to facts that would indicate that Mr. Goodyear had asthma and heart trouble before he received his injury; but since the verdict of the jury is a finding that the injury caused the death of Mr. Goodyear, there is no need to go into detail as to the conflict of the evidence. The following illustrates the defendant's testimony along this line:

Vern L. Jones: Had known Mr. Goodyear since 1907, and had seen him nearly every day because the witness was in the same department of the railroad and Mr. Jones was clerk who kept Mr. Goodyear's time. In February, 1920, he talked with Mr. Goodyear and Mr. Goodyear said he guessed he was getting along very well, also said, "If it wasn't for the condition of this knee of mine, I would be getting along all right"; also saw him about March 1, 1920. Before the injury in July, 1919, the witness had noticed that Mr. Goodyear had asthma and hay fever, and had shortness of breathing. "Rather wheezing during the usual asthmatic or hay fever period." His eyes watered and and been stopped up at the nose. But did not know that this ever caused Mr. Goodyear to lay off work. The witness then produced a copy of the time record of Mr. Goodyear, and a transcript of the time when Mr. Goodyear laid off from 1912 was introduced in evidence. This shows that in 1912 Mr. Goodyear laid off nineteen days. In 1913, nineteen days. In 1914, nine days. In 1915, twenty-three days. In 1916, sixteen days. In 1917, four days, with time table not showing the entire year. In 1918, nine days and in 1919 worked every day from January until July 31st. (404-411.)

Mr. Goodyear, before the injury, had been a rugged man physically, but in February, 1920, he was pale. That he was not a man given to laying off work except for rest or to visit relatives, which is not an uncommon thing for a railroad man to do, especially when they work seven days a week, and he had no personal recollection of Mr. Goodyear laying off on account of sickness. That his hay fever came in the fall of the year, and lasted until frost (404-415).

Louis Vanous: Employee of the defendant; had worked with Mr. Goodyear, and one time he had been sick, and when he came back to work, said, "My asthma bothered me and hay fever." After the injury he saw him up town, but did not know the time, but Mr. Goodyear said he had settled that day with the Rock Island, and the witness asked him if he was not in a hurry to settle up, and Mr. Goodyear said, "Well, I am getting to feel sometimes all right and sometimes not very good." "Well, I am settling for I got $1,135.00." He also said that "Well, I was not like I was, Louis, I may not work fifteen years more for the Rock Island Railway, and that money is coming to be a object to me" (455-459).

In cross examination, the witness said Mr. Goodyear walked pretty slow and was pale and thin (459-460).

Dr. H. D. Thomas: Is a physician and surgeon, knew Mr. Goodyear before 1919, and had treated the family before that time. After the injury he cleaned and dressed Mr. Goodyear, and examined his body and treated the injuries, and he had considerable pain on the right side, and found two ribs fractured and he was scraped and bruised (461-467). He treated him in the home and then at the office, and continued to treat him until March. During the winter he only complained of his knee, and the doctor treated him for that, and made no complaints of pain anywhere except his knee after the 1st of September, 1919. The doctor was a representative of the railroad during all of this time, as local physician. He treated him for the knee and treated him for an asthmatic attack in November, which was rather a severe attack, and he had very difficult breathing and was unable to lie down. In January, the 28th, he came to the office and wanted something for a cough, and said he had had a mild attack of flu. He examined him several times, one time along about six weeks after the accident, and then in the spring several times, and found nothing wrong with him, other than the knee, and a slight enlargement of the heart. He examined him the 1st of March, 1920, and did not find much change, he had considerable trouble about breathing and the doctor examined him to find the cause. And about the 19th of March, found fluid in his chest (467-474).

In answer to a question as to statements made to Mr. Goodyear as to being well or able to return to work, the doctor said, "We—from the time he was up and around, we discussed the times when he was able to go back to work; the first time he thought he would be able to go back about the 1st of November. The knee kept giving him considerable trouble at that time so several later dates were set" (474). That he discharged him as a railroad patient sometime in March, 1920, and had been treating him as such up to that time, and "He just kept coming down to the office until he was discharged and able to go back to work. Had given him a final report when he was able to go back. I had sent in a final report" (475). The doctor said he knew Mr. Goodyear had some trouble with his breathing in January, and he would have to stop and rest when he walked, and this difficulty in breathing continued until March. He assisted Dr. Munford at the autopsy, and said that towards the back of the chest cavity, around the right lung and bound to the chest wall were adhesions, and on the inside of the adhesions, there was a small quantity of pus. This pus was mixed with a jelly like substance and was one and one-half to two inches across (476-483). He was consulted by Dr. Munford when the death report was made in which the cause of death was stated to be traumatic pleurisy and hyperthrophied heart. But his present opinion is that the cause of the death was angina pectoris, a condition of the heart which means severe pain over the heart (483-491).

In cross examination, Dr. Thomas testified that Mr. Goodyear's heart was enlarged, and he was unable to tell of how long standing; and that pressure on the lungs would produce an enlarged heart, and make difficult breathing; that sufficient pressure of fluid in the chest cavity could produce an enlargement of the heart. That he did find a condition of traumatic pleurisy, which is an infection of pleureal membrane because of some external blow (491-494). At the time of the autopsy he had not concluded that the cause of the death of Mr. Goodyear was angina pectoris, but after the autopsy (495).

He had been the Goodyear family physician previous to this injury and was also the railroad doctor. He noticed, in November, that Mr. Goodyear breathed hard and this continued until March. Mr. Goodyear talked about

going back to work at different times. The first time was in November and later the doctor considered that his difficulties had cleared by the 1st of March, so that he could go back to work, and Mr. Goodyear seemed very anxious to go back to work; and "he considered that he would be able to go to work on the 1st of March as you understood his talk," to which the doctor replied, "Yes, sir," and the doctor discharged him as a company patient the first of March (496-502).

Redirect examination:

That in his talk between him and Mr. Goodyear as to when he could go to work, the one thing that was preventing was his knee, as his duties in coupling and uncoupling the hose on trains, required him to kneel on his right knee, and as long as he had trouble in the right knee he could not get clear down, so that was the reason he could not go to work. "He usually talked and wondered when he could go to work; about the knee getting better so that he could bend it; that was the trouble, if he could just bend the knee so that he could get that knee to the ground, he could work that all right; otherwise, he felt capable of doing his work" (506).

This conversation about the knee occurred several times. Later Mr. Goodyear said the knee was cleared up, so that he could bend it better; and "it did clear up to the extent that he could assume the position which he had formerly assumed, that is, bending his right knee." Then this question was asked him:

Q. About what time of the year 1920, did his knee so recover that he could bend it and assume the kneeling position such as you have testified, he stated to you, he assumed in the performance of his duties?

A. I think it was some time in February, because he planned next to go to work the first of March (506).

Q. Now, did you make any statement to him as to his returning to work?

A. As soon as he was able to work, it would be all right to go to work; yes, sir.

Q. He was the judge as to whether he was able to go to work?

A. I left it up to him. I left it up to him.

Q. Were you of the opinion that he was?

A. As soon as he could get down in that position (506-507).

The doctor considered his side all right in about a month or five weeks after the injury was received. Then in November, he had difficulty in breathing, and in January, the same thing; but that leaving his knee out of consideration, he had otherwise recovered from the injury by January, 1920 (507-514).

B. H. Stiers: Testified he was the claim adjuster for the Rock Island and handled this Goodyear claim and identified Exhibit 7, as being the statement taken from Mr. Goodyear after his injury; and obtained the facts which are set forth therein by asking Mr. Goodyear who told him the facts as he wrote them down, and such statement clearly represents his statement, and this Exhibit was admitted in evidence (583-586).

Then the latter part of September, he saw Mr. Goodyear on the street, he was getting along slowly as he was having trouble with his knee. Then saw him in the middle of November, and he said he was getting better, and that if his knee was right that he might go to work. His knee was giving him some trouble. Saw him at other times when he complained that his only trouble was with his knee, and it was arranged that he would see some company doctors at Lincoln and Fairbury. The witness again saw him, and he said that he had an elastic stocking for his knee, and that he had been getting better since he put it on. The next time he saw him was on the 12th of March, and Mr. Goodyear said, "I want to go to work. I was just going down to see the doctor." Said he was getting along fine. Been wanting to go to work several days, and would like to go to work the first of the week if he could settle with the Rock Island. So they went to a hotel at which time Mr. Goodyear took a little note book out of his vest pocket, and looked at it, and said he thought he

ought to have $1,200.00 and his doctor bill, and Mr. Stiers thought $1,100.00 was enough; and then they settled for $1,135.00, after he again consulted his note book. It was agreed that Mr. Stiers should get the draft and return in a day or two (587-594).

He returned on the 16th of March and telephoned to the house, and Mr. Goodyear asked him to come to the house, that he had been troubled considerable with asthma, so the release was signed at the house. Then Mrs. Goodyear wrote about understanding the release at the request of Mr. Goodyear. The same evening about one-half hour later, Mr. Goodyear called him over the telephone at the hotel and said, "My son said that I ought to have time and one half for Sundays." But Mr. Stiers said settlement had been made (594-601).

Cross examination:

The former testimony of the witness at the first trial was read to him in relation to the settlement being for straight time, a part of which is as follows: "At the time at the house when you were there, was there anything said at that time about being paid straight time up until March 1st, from the time of the injury?" to which the witness answered, "He did." Also, "What did he say?" "He said that gives me straight time, I understand from the amount the company is going to pay us some back pay." The witness admitted that such statement was made by Mr. Goodyear at the house, when Mrs. Goodyear asked if the amount of settlement was correct. And Mr. Goodyear looked at his book and said, "Yes, sir; the figures are correct, that will give straight time from when I was injured. I understand from the amount the company is going to pay us from back pay" (601-605). The last time the witness had seen and talked to Mr. Goodyear before the settlement was in January, 1920 (605-607).

Redirect examination:

He said he knew Mr. Goodyear before his injury and that he never noticed any difficulty in his breathing after the injury as being different before the injury until March 16th, when he seemed to be breathing a little harder (608-610).

Proceedings on Motion for New Trial

At this hearing the plaintiff presented some motions which sought to set aside the findings of the jury, and for a new trial as to the issues which were found against the plaintiff. At that time the question of the instructions of the court as to mutual mistake was discussed and the court said:

"There is nothing serious in that motion except that of the competency of the final finding that death was the result of the injuries must show they were mistaken at the time the release was entered into. On this release I have given them every instruction. I finally formed the opinion that was not the correct test. No matter how fairly and in good faith or under what belief or what right to believe a man may have or no matter what spirit even they may have, they found that he mutually agreed upon the release, and I don't believe however after all they were mistaken necessarily or that that makes a mutual mistake. If it is, there never could be an agreement, which if it is shown by some reason or the other to be wrong, they necessarily made a mutual mistake. I believe they must be mistaken entirely based on the knowledge they have if they were both mutually mistaken—if it based on the belief of Goodyear and they come together and mutually agree, then the mere fact that time shows they were mistaken certainly does not make a mutual mistake as I understand a mutual mistake to be. I have spent a good many hours on the instructions covering that point and I have made up my mind and come to the conclusion that I think I will stand by them even though they fail to meet all your motions here. I suppose you wish me to pass on them separately."

Thereupon the court overruled all the motions of the plaintiff.

Offers in Evidence

Exhibits

Plaintiff's Exhibit 2 is a check to H. H. Mumford for $52.00, dated May 18, 1920. This is for his medical services in attending the deceased during his last sickness.

Plaintiff's Exhibit 4 is a check to F. R. Bachelor for $272.60 and dated May 21, 1920, and is for undertaking expenses burying Lewis Goodyear.

Plaintiff's Exhibit 3 is a check to the City of Belleville for $60.00, dated June 7, 1920, and was given for cemetery lot and grave for burial of Lewis Goodyear.

Plaintiff's Exhibit 1 is a certified copy of the death certificate given by Dr. R. H. Munford, and shows the death of Lewis Goodyear, and was filed May 5, 1920. It shows the cause of death to be "Pleurisy Traumatic with Acute Dysmia Hyperthrophied Heart."

Defendant's Exhibit 1 is the original general release, of which a copy attached to the defendant's answer is a correct copy.

Defendant's Exhibit 2 is the draft that was given by B. H. Stiers as adjuster and was drawn on the United States Railroad Administration of the Chicago Rock Island Pacific Railway, for $1,135.00, and dated March 16, 1920, payable to Lewis E. Goodyear, "for personal injuries received on July 31, 1919, while employed as car inspector, at or near Belleville Kans., filed 19-384." Endorsed "Lewis E. Goodyear," and marked, "Paid by the said Railway Company, March 29, 1920."

Certificate

The foregoing is a true and correct abstract of the record in the above entitled case.

N. J. Ward, John F. McClure, Attorneys for Appellee.

Specification of Errors

1. In refusing instructions asked by plaintiff.

2. In giving instructions which were prejudicial to the plaintiff.

3. In overruling plaintiff's motion for a new trial, as to the first count of the first cause of action.

4. In overruling plaintiff's motion for new trial as to the second count of the first cause of action.

5. In overruling plaintiff's motion to set aside the findings of the jury.

N. J. Ward, John F. McClure, Attorneys for Appellee.

In Supreme Court of Kansas

No. 26347

[Title omitted]

Appellant's Abstract on Cross-Appeal—Filed April 30, 1926

Statement

Appellant, against whom judgment was rendered in the District Court of Republic County, saw fit to bring the record of the case to this court and seek relief from the judgment solely on a question of law. Appellee obtained judgment in the District Court upon what her counsel terms the first "count" of a cause of action arising under the federal employer's liability act and caused a transcript of the evidence introduced at the trial to be made. This transcript consists of 615 pages. These 615 pages of evidence have been abstracted by appellee in 28 pages (11 to 39) of abstract. The result is a garbled presentation of the facts with numerous omissions of most important evidence and proceedings at the trial. Because the facts on every issue were found favorable to the defendant below and against the allegations of plaintiff's petition, appellant had no reason to abstract the evidence, as it was the desire to present the case upon questions of law. Since counsel for appellee volunteer the conclusion at the bottom of page 30 of appellee's abstract that "since the verdict of the jury is a finding that the injury caused the death of Mr. Goodyear, there is no need to go into detail as to the conflict of the evidence," appellant now finds it advisable to point out to this court, and we do so hereing, some glaring errors with respect to the non-admission of the testimony of Dr. A. R. Mitchell of Lincoln, Nebraska, and of Dr. Albert Lynch of Fairbury, Nebraska, which, if admitted, in all probability

would have changed the result of the verdict, except for objectionable instruction number 8 (appellant's abs. 27) which appellant has attacked in its appeal and presented fully in his original abstract and brief.

We submit the following as a counter abstract of appellant on cross appeal.

Abstract of Testimony

Dr. A. R. Mitchell, called as a witness for appellant, gave the following testimony, and appellant offered further testimony which was refused (Tr. 514-18):

"Q. 1. Please state your name.

A. A. R. Mitchell.

Q. 2. Where do you reside?

A. Lincoln, Nebraska.

Q. 3. What is your profession?

A. Physician and surgeon.

Q. 4. How long have you been engaged in the practice of medicine and surgery?

A. 45 years.

Q. 5. Of what school are you from?

A. Rush Medical College.

Mr. Ward: We admit his qualification for surgeon and physician.

Q. 6. After graduating from school, where did you engage in the practice of medicine?

A. At Lincoln.

Q. 7. Have you been there continuously during your professional career?

A. That the only location.

Q. 8. Are you a member of any Medical Societies?

A. Yes, sir.

Q. 9. Of what societies are you a member, doctor?

Mr. Ward: Your Honor, we admit his qualification: We object to further qualification as immaterial.

The Court: Well, I think that if desired he may state the qualifications to the jury. Overruled.

Mr. Ward: We object further as immaterial as to what societies he may belong.

The Court: Overruled.

A. I believe I can state the associations: The American Medical Association; the Western Surgical Association; The American College of Surgeons; and several others I don't recall just now.

Q. 10. Are you and have you been an officer of any of those societies?

A. Yes, sir.

Q. 11. Are you at this time an officer?

A. Yes, sir.

Q. 12. Are you connected with any hospital?

A. Yes, sir.

Q. 13. What hospital?

A. I am Senior Surgeon of the St. Elizabeth Hospital, the largest hospital of Lincoln.

Q. 14. How long have you been connected with that hospital in Lincoln?

A. Ever since it was built 35 years ago.

Q. 15. Doctor, did you during the fall of 1919 become acquainted with Lewis Goodyear?

A. Yes, sir.

Q. 16. Where did you see him?

A. At my office.

Q. 17. That was your first acquaintance with him?

A. Yes, sir.

Q. 18. Upon coming to your office did he say to you at whose direction he had come?

Mr. Ward: We object as calling for privileged testimony between physician and patient; and hearsay besides.

The Court: As to that question I will sustain the objection upon the ground that it is privileged.

Q. 19. Now, did you give him an examination?

A. Yes, sir.

Q. 20. To what extent did you examine him?

Mr. Ward: To which the plaintiff objects as calling for testimony that is privileged between physician and patient and forbidden by statute.

The Court: Before I pass on that, I want to talk to you. (Consultation.) Objection sustained.

Q. 21. What did you find?

Mr. Ward: To which the plaintiff objects as calling for privileged testimony between physician and patient.

The Court: Sustained.

Q. 22. Now, in what manner did you proceed to make your examination?

Mr. Ward: Same objection.

The Court: Same ruling.

Q. 23. Did you make any charge for your services?

Mr. Ward: Same objection, and for the further reason that it is immaterial.

The Court: Sustained on both grounds.

Offer of Proof

Mr. Du Mars: The defendant offers to prove by this witness that at the request of the defendant, through its claim agent, B. H. Stiers, the deceased, Lewis Goodyear, went to Lincoln, Nebraska, about the 19th or 20th day of November, 1919, where he went to the office of the witness, Dr. A. R. Mitchell, in the City of Lincoln; that at that place and that while there, Dr. A. R. Mitchell gave or made a complete examination of Goodyear; that he stripped him and examined his head, chest, body and limbs for the purpose of ascertaining if anything was wrong with him; that the deceased made complaint about his knee and made no particular complaint of any other part of his body, excepting that he stated to Doctor Mitchell that he suffered much with asthma; that he could not and that he did not have the power of endurance; that he could not work continuously without resting because of his difficulty in breathing.

That the doctor gave him an examination and ascertained that he was suffering with heart trouble in a very bad form to the extent that his health was in all probability permanently impaired; that the doctor determined from this examination that the injuries received in the accident at Belleville on July 31 had nothing to do with the present condition of the deceased; that there were no evidences of injuries present at the time of the examination and that no

complaint was made other than as stated, with the exception of the knee trouble and the difficulty in breathing and the heart condition; that in the opinion of the doctor his heart condition was such as would ultimately cause his death.

Doctor Mitchell will further testify that Lewis Goodyear was not and had not been his patient, but that he came and that he gave him the attention and made the examination at the request of the representatives of the defendant.

Mr. Ward The plaintiff objects to the offer for the reason that all of the facts stated there come within the prohibition of the statute relating to privileged communications between physician and patient.

The Court: Objection sustained and offer refused."

An affidavit of Doctor Mitchell was presented to the court upon motion for new trial, which affidavit is as follows:

AFFIDAVIT OF A. R. MITCHELL.

"A. R. Mitchell, being first duly sworn, upon his oath states that he is and for many years has been a resident and citizen of the city of Lincoln, Lancaster County, State of Nebraska. That he is now and has for many years been engaged in the profession of medicine and surgery.

"That on the afternoon of October 28, 1924, at the request of the defendant in the above-entitled cause, he went to Belleville, Republic County, Kansas, to testify on behalf of the defendant in said cause. That he was present throughout the trial, remaining in attendance upon said court until adjournment thereof on Thursday, November 6, 1924, except that he was absent therefrom Saturday, November 1st.

"Affiant further states that he was called to the witness stand by the defendant and offered to testify on behalf of the defendant with respect to his examination of Lewis Goodyear at the office of this affiant in the City of Lincoln, Nebraska, on or about the 29th day of November, 1919. That he was questioned about his examination and the result of such examination of Lewis Goodyear, and that attorneys for plaintiff objected to his testimony on the ground

that the same was privileged. That if affiant had been permitted to proceed with his testimony, he would have testified as follows: That Lewis Goodyear of Belleville, Kansas, husband of Louisa Goodyear, plaintiff in this cause, was examined by him on or about the said 20th day of November, 1919; that upon such examination affiant ascertained that said Goodyear was suffering with heart trouble, and that there was present an enlargement of the heart and heart lesion. That at the same time said Goodyear stated that he had suffered for a number of years previous with difficulty in breathing. That he had the appearance of being a man old for his years. That there was present at the time of such examination no pleurisy or any indication or suggestion of pleurisy. That from his examination of said Goodyear and the state of his health on such examination, it would have been impossible for pleurisy to have developed from injury sustained on July 31, 1919, and that if a pleuritic condition or empyema developed, it must have resulted from an acute infection entirely independent of any injury sustained on said July 31st.

"Affiant further states that on the occasion of said examination he stripped the said Lewis Goodyear to the waist and examined his head, chest, back, abdomen and body thoroughly. That there remained no evidences whatsoever of any injury except a condition in the knee, which indicated a subluxion of the semilunar cartilage of the knee. That such injury was entirely local and had no connection and could not be connected in any way with pleurisy or any other condition of the body.

"Affiant further states that he requested the said Goodyear to consult Doctor Albert Lynch of Fairbury for the purpose of further examination by means of the X-ray or fluoroscope.

"Affiant further states that said Goodyear made *no* complaint of any physical disability except that he had suffered with difficulty in breathing for a number of years and this affiant believed and now believes and would have so testified that the difficulty in breathing was due to the impaired heart condition and that the said death of Lewis Goodyear was due to disease of his heart.

"Affiant further states that his first acquaintance with Goodyear was on the 20th day of November, 1919, and that

the said Goodyear was not a patient of this affiant, but was sent to affiant by a representative of the Claim Department of this defendant, and that his services were paid for by the defendant. That no confidential relation existed between said Goodyear and this affiant but that it was expected and intended that the result of said examination should be reported and was reported in whole or in part to the authorized representatives of the defendant in this cause.

"Further affiant saith not."

Also Doctor Albert Lynch, called on behalf of appellant, gave the following testimony, and appellant offered further testimony, which was refused (Tr. 548-549):

"Q. 1. Please state your name.

A. Albert Lynch.

Q. 2. Where do you reside?

A. Fairbury, Nebraska.

Q. 3. What is your profession?

A. Physician and surgeon.

Q. 4. How long have you been engaged in the practice of your profession?

A. 24 years.

Q. 5. Of what schools are you graduated?

A. University of Michigan, John Hopkins.

Q. After completing your course in medical college, where did you locate?

A. Fairbury, Nebraska.

Q. 7. Been there all the time?

A. Not continuously; I located in Flint, Michigan, first.

Q. 8. And then went or moved to Fairbury?

A. Yes, sir.

Q. 9. Did you specialize in any branch of medicine or surgery?

A. I am called upon to do more surgery than medicine.

Q. 10. And did you on or about the 20th or 21st day of November, 1919, become acquainted with Lewis Goodyear?

A. I did.

Q. 11. Where did you see him?

A. At my office.

Q. 12. How many times did you see him?

A. Twice.

Q. 13. Did you know at whose request he first came there?

A. Doctor Mitchell sent him there.

Q. 14. You have an X ray machine?

A. X ray examination.

Q. 15. Doctor Mitchell at that time didn't have it? After seeing him on or about the 29th day of November, did you see him again?

A. I did.

Q. 16. At whose request did he come the second time?

A. At my request.

Q. 17. That was for the purpose of making a further examination?

A. Yes, sir.

Q. 18. Did you make an examination of Mr. Goodyear on either or both of the occasions when he was at your office?

A. I did.

Q. 19. You were paid for your services, were you?

Mr. Ward: Object as immaterial whether paid or not. The Court: Overruled.

A. Yes, sir.

Q. 20. You know the Rock Island Railway was under Federal Control during the period of Federal control of railroads?

A. Yes, sir.

Q. 21. You may state whether or not you were paid by the Director General of the Railroads for your services.

A. I was.

Q. 22. Now, you may state, doctor, in what condition you found Mr. Goodyear upon the first occasion when you examined him.

Mr. Ward: To which the plaintiff objects as calling for privileged testimony obtained when a physician was examining his patient and is forbidden by statute.

The Court: Sustained.

Q. 23. What steps did you take to make an examination of Mr. Goodyear?

Mr. Ward: Same objection.
The Court: Sustained.

Q. 24. Now, what was his condition as you determined it on the occasion of your first examination?

Mr. Ward: Same objection.
The Court: Sustained.

Q. 25. Now, you may please state what you found on the occasion—what condition you found upon the occasion of your second examination?

Mr. Ward: Same objection.
The Court: Same ruling.

Offer of Proof

Mr. De Mars: We make the same offer which we made in connection with the testimony of the witness, Doctor A. R. Mitchell, of Lincoln, Nebraska, except that Doctor Albert Lynch examined the patient by means of the fluoroscope and found that his heart was enlarged. And he also examined his body thoroughly and found no evidence of adhesions anywhere in the pleura either right or left side, and that if adhesions had been present they would have been readily visible by means of the fluoroscope.

That this witness, if permitted to testify, would further tell that he made an X Ray examination of Mr. Goodyear's knee and found some trouble there and recommended the use of an elastic stocking.

Mr. Ward: To which the plaintiff objects for the reason that it calls for testimony or pertaining to testimony that is privileged being that obtained by a physician in attendance on his patient, and is forbidden by statute.

The Court: Objection sustained and offer refused."

As tending to show the physical condition of deceased, Lewis Goodyear, before the date of the accident, N. G. Ross (Tr. 416) testified that he resides at Belleville, Kansas; his occupation is that of a car inspector for the Rock Island

Railway; he has been with the railroad 34 years; he was employed during the period of federal control; he had been acquainted with Lewis Goodyear 14 to 15 years; Goodyear was a car inspector (Tr. 417) and witness worked with him; it was customary for car inspectors to work by two's; [fol. 113] Goodyear was a medium sized man; witness observed his physical condition when working with him (Tr. 417-420).

"Q. 18. You may state what, if anything, you noticed was unusual in connection with his physical condition.

A. When Mr. Goodyear worked at anything that was hard, he would get simply to breathing hard; hard to breathe.

Q. 19. How long did you notice that condition?

A. Well, I noticed that—how long a time I don't know except that I noticed it for the last ten years.

Q. 20. State to the jury what he would do and how he would act on the occasion when he was in that condition.

A. When he had to work hard; sometimes we had rush work and had to work very hard, he would get out of breath. And I saw it worrying him too about to death and I would say to him, 'Mr. Goodyear, I will do that and you do this easy work.'

Q. 21. Did you notice any change toward the latter years as to whether he got better or worse?

A. No, he was getting worse.

Q. 22. Now, when he came to work in the morning, would he generally be in condition or not?

A. Well, after we had worked a short time, he would commence to—well, his breathing would be so that it was hard on him to breathe.

Q. 23. Did you—could you hear him?

A. Yes, sir.

Q. 24. How far distant would you or could you hear him breathe?

A. Well, I can't exactly recall the distance.

Q. 25. How did he breathe as to rapidity? Was it rapidly or slowly in those times?

A. At the time he would try to breathe, it would bother him to breathe; kinda' hard for him.

Q. 26. Would he choke up?

A. Once in a while; yes, sir.

Q. 27. How often would he be seized with those attacks?

A. Well, I seen him some days he would have to very nearly lay off; difference in the spells; not continuously; he would relieve them in a short time and it would be hard for him to breathe again, especially if he exerted himself very much.

Q. 28. What kind of exertion would affect him in the manner that you describe?

A. In the case of rush job to be done. On the railroad was had to be quick work done and hard. Well, it was kinda' hard on him to be quick. Such things as putting in braces; put in brake hangers, knuckle pins and knuckles.

Q. 29. You may continue your answer, Mr. Rost.

A. And steam hose.

Q. 30. How was he affected when he worked on that kind of work and he worked rapidly?

A. He was short of wind.

Q. 31. Did he make any statement to you as to what the trouble was?

A. He did.

Q. 32. Did he? What did he say the trouble was?

A. He said asthma was what troubled him.

Q. 33. What season or seasons of the year was he affected?

A. He was affected with asthma most of the year, most all the time; but in the fall of the year he was affected worse on account of hay fever and asthma combined.

Q. 34. So his asthma was with him and troubling him the entire year around?

A. Yes, sir.

Q. 35. Did he say anything to you about as to whether he would be able to continue working or not?

A. He told me it was a hard proposition sometimes to keep up the work.

Q. 36. How often would you ease his work by taking the harder work as you have testified?

A. I cannot exactly say how often because I don't remember how often; it was perhaps—it must—really, whenever I had a chance to relieve him, I did it.

Q. 37. Now, did you notice anything else out of the ordinary in connection with his actions?

A. Yes, sir.

Q. 38. You may state what, please.

A. When he would sit down in the chair for a certain length of time, he would get up by taking hold of the hips like this (indicating) when he would get up from his chair; he was very nervous.

Q. 39. How long did you notice that nervous condition?

A. Well, I noticed that nervous condition since I began to work with him.

Q. 40. Did you notice any change during the later years in this respect?

A. He got more nervous as he grew older.

Q. 41. Just state what he did in his nervous condition.

A. Well, he would move his right hand fingers all the time like this (indicating), and he generally carried a hammer and always passing it back and forth. Tossing it back and forth."

Also B. H. Sykes (Tr. 583), who testified in part substantially as follows:

He resides at Lincoln, Nebraska; he is Claim Adjuster for the C. R. I. & P. R. R.; he knew Lewis Goodyear in his lifetime (Tr. 584)—had known him at least nine years as a car inspector; he knew of the accident on July 31, 1919; he saw him at his home on August 2nd; he took his statement as to the injury at that time—it was marked defendant's Exhibit 7, second trial; his business called him frequently through Belleville; he would meet Goodyear occasionally and inquire as to his condition; on one occasion he recommended that he go to see Doctor Mitchell at Lincoln, Nebraska; he saw Mr. Goodyear after the latter had been to see Doctors Mitchell and Lynch.

Witness testified (Tr. 590-594):

"Q. 70. Did you talk with him subsequent to his visit to Doctor Mitchell?

A. Yes, sir; the next time I saw him; I can't say when that was, it was some time after. I saw him and asked him, 'How are you getting along?' And he said, 'I am getting better.' Doctor Mitchell and Doctor Lynch examined me and they prescribed an elastic stocking, a band-

age which I put on my knee; that has been getting better since I put that on.'

Q. 71. Do you remember where you had that talk with him?

A. No, sir; I do not.

Q. 72. Now, when after that would you say that you saw him?

A. The next time after that I saw him on the 12th day of March, 1920, right across from the crossing, over north of the crossing about opposite the Davis cafe. I was going east and Mr. Goodyear was going west and I met him.

Q. 73. Did you see him approaching?

A. Just as he got up to me; I hadn't noticed him until about ten feet of me.

Q. 74. Was he walking with the aid of a cane or any other assistance?

A. No, sir.

Q. 75. Did you talk with him any at that time?

A. Yes, sir.

Q. 76. What was the conversation?

A. I spoke and he spoke and said 'Mr. Stiers, I am glad I seen you; I was just going to write you about it. I want to go to work; I was just going down to see the doctor.' I then said, 'How are you getting along?' He said, 'I am getting alone fine; been wanting to go to work for several days. I would like to go to work the first of the week if I can settle up with the Rock Island.'

Q. 77. All right?

A. I then said, 'Mr. Goodyear, I am going down now to the Rock Island Hotel where I have an appointment. If you come down to the Rock Island Hotel I will talk to you when I get time; I am going out but will be at the Rock Island Hotel until probably 8:00 o'clock tonight. If you come down and talk the matter over with me, I think we can adjust it without any trouble.' He said, 'I think so; I will be there.' I went on down to the Rock Island Hotel and he went to town.

Q. 78. Did he later meet with you?

A. He came to the Rock Island Hotel within an hour from after that.

Q. 79. Where did you see him and talk with him at the Rock Island Hotel?

A. In the office of the Rock Island Hotel.

Q. 80. As you recall, was there anyone else present when Mr. Goodyear came in?

A. Yes, sir.

Q. Who was it?

A. Mr. George Kauntz, a Rock Island foreman by the name of Roberts and Harry Kauntz.

Q. 82. All right, did you and he talk about and take up the matter of settlement at that time?

A. Yes, sir.

Q. 83. Just as near as you can, relate what took place between you? What was said and what was done?

A. Mr. Goodyear came into the hotel and came walking into the office. I was sitting there waiting and watching Mr. Kauntz and this Mr. Roberts playing—I don't know, I guess cribbage; and Mr. Goodyear came walking in. I looked around and saw it was Mr. Goodyear, and I got up and got a chair and set it down for him right there by the desk. There is a desk over on the north side of the office against the wall. I set the chair down there and I set my chair down by Mr. Goodyear and moved over by him, I said 'Take a chair, Mr. Goodyear.' We sat there and talked a little bit about different things, the weather, etc., and I said to him, 'Well, Lewis, you figure you are ready to go back to work, do you'? He said 'Yes, sir'. I said, 'You want to settle up with the Rock Island?' 'Yes, sir.' 'What do you think the Rock Island ought to do for you? What do you expect them to do for you?' He said, 'Will they pay the doctor bill?' I said, 'That will all depend, Mr. Goodyear, upon the amount which you ask in settlement.' He then took a little notebook out of his vest pocket and looked in the notebook and turned around and said to me, 'I think I ought to have $1,200.00, and my doctor bill.' I said 'Lewis, you are asking a little too much in my judgment; I will give you $1,100.00.' He then looked in his book again and said to me, 'I have been to some expenses. You sent me to Lincoln. I went to Lincoln and had some expenses up there. Went over to Fairbury. Then they wanted me to go back to Fairbury. I had some expenses each time I was up there. I wanted to use the elastic stocking—(elastic anyway, whatever it was he had)—I had to buy it and that

cost me some money.' I said 'About what where your expenses, Mr. Goodyear, to Lincoln, Fairbury, and the elastic or stocking or bandage you bought?' He said, 'I don't know; in the neighborhood of $20.00; it might be a little more; maybe a little less. I can't say what they figure.' I said, 'Will $35.00 take care of it and make you whole?' He said, 'Yes, sir.' I said, 'Then, I will give you $1,135.00 and settle with you.' He looked at his book and then turned around and he said, 'That's fair; I will settle with you.' I then said to him, 'I can not draw you a draft, Mr. Goodyear at this time without first getting authority because the government requires that I get authority to draw drafts for over a thousand dollars; one thousand and over. I will have to wire for that authority which I may get here in a day or two; it may be a day or two but I will get the authority to draw the draft.' He said, 'That's all right; I am not worrying about that now that we have settled.'

Q. 84. Is there anything else of importance in connection with the talk of settlement at this time?

A. That ended the settlement and the conversation at that time, and I got up and went to the depot to send his wire.

Q. 85. In connection with your settlement and the statement that you would give him the sum of $1,135.00, was there anything said again about doctor bills?

A. No, sir; I told him that I would give him $1,100.00 and take care of the doctor bills.

Q. 86. And so your figures were then increased to $1,135.00?

A. After I said $1,135.00, there was nothing mentioned about any doctor bills.

Q. 87. Do you know whether the doctor bills were taken care of by the government?

A. They were paid by the government.

Q. 88. After you went to the depot and sent your wire, did you see Mr. Goodyear again?

A. Yes, sir; shortly.

Q. 89. Where?

A. I went in the depot and sent my wire and when I came out I went west from the office to the depot to go back to the Rock Island Hotel; when I came out and went

west, Mr. Goodyear and Mr. Kauntz and I remember the Yard Master, Neal, and I don't know who else, were standing about half way between the west end of the depot and the eating house or platform, all standing there together talking.

Q. 90. Did you stop?

A. I didn't stop but, as I went by I spoke and said, 'I sent the wire Mr. Goodyear' and went on to the Rock Island Hotel.

Q. 91. Did you get any reply at that time while you were here on that day?

A. I did not.

Q. 92. When did you again take the matter up with Mr. Goodyear in relation to this settlement?

A. On the 16th of March.

Q. 93. What time of day?

A. Well, it was something, somewheres near a half hour I would say before 6:00 o'clock in the evening; I couldn't say for sure but probably it would be around 5:30 to 5:45; I went from the depot to the Rock Island Hotel."

Witness further testified that on March 16, 1920, he talked to Mr. Goodyear on the telephone, when the latter was at his house.

"Q. What passed between you?

A. When he answered the phone, I said, 'Mr. Goodyear, this is Mr. Stiers.' He said, 'I recognized your voice.' I said, 'I have authority to draw the draft for you. If you can come down to the Rock Island Hotel, I will draw the draft, and take the release.' He then said, 'Could you come out to the house? I have been troubled considerably today with asthma and I am wheezing pretty bad. I could walk down but I would rather you would come out to the house. My son is in the car right outside and I will have him come down and get you in the car if that will be all right with you?' I said, 'Certainly, I will come out to the house.' And in a very few moments after this conversation, his son came down to the hotel.

Q. 97. And did you go out to the house with him?

A. I went out to the house with him."

Witness then went to the Goodyear residence where the members of the family were present and delivered the draft for $1,145.00 (Tr. 507) and took the release. With respect to the transaction he said (Tr. 508):

"A. They were all in the sitting room, Mr. Goodyear sitting there in a rocking chair of some kind; Mrs. Goodyear was sitting opposite of him and a little to back of him. When I went in, we passed the time of day and talked about different things, then I said, 'Mr. Goodyear, I now have authority to draw the draft and take your release. Is there some place that I can set my typewriter and fix out the papers?' Mrs. Goodyear then spoke up, 'There's a stand over there,' and I think she called and told Mary to clear that off, and Mary cleared it off and I set my typewriter and began to write out the release. I wrote out the draft and read the release to Mr. Goodyear out loud, handed it to him and told him to read it. He took it and looked at it and didn't read it aloud. I can't say that he read it, he was looking at it long enough to read it.

"Q. 100. Did he have his spectacles on?

"A. He did. He handed it and an account book with writing to his wife. She looked at it. After looking at it a few minutes, she said, 'Lewis are you sure this is right?' He reached in his pocket and got out his little book and referred to it and said, 'Yes, sir, that is the right figures.' She then handed the release back to Lewis. I said, 'Lewis, sign your name on this line' and I indicated the line on which he was to sign his name. And then when he was going to sign it, there was a desk in the living room kinda' in front, a desk that had a lid that slipped down. He used my fountain pen and signed it. I said to him, 'Mr. Goodyear, it will be necessary for you to write in these words in the release.' And then I quoted the words, which I wanted him to write in the release. I then quoted the words, 'I have read the above and understand the same to be a release.'"

Dr. H. D. Thomas (Tr. 474) testified:

"Q. 109. Now, did you at any time make any statement or representation to Mr. Goodyear that he was well or that he was able to return to work?

A. We from the time he was up and around, we discussed the times when he was able to go back to work; The first time he thought he would be able to go back about the 1st of November. The knee kept giving him considerable trouble at that time so several later dates were set.

Q. 110. Well, who made the statement with respect to his returning to work? You or he?

A. Mr. Goodyear suggested the date that he thought he could go to work.

Q. 11. Did you tell him whether he could or could not or did you leave it entirely to him?

A. I left it all to him as to when he could go to work.

Q. 112. Did you rely upon him and upon his statement to you as to his physical condition and his ability to go to work?

A. I did."

Moe (Tr. 481) testifying with reference to the location of adhesions which were found on the postmortem examination with respect to the fractured ribs, witness testified (Tr. 481-2):

"Q. 106. Now, with reference to the point of fracture of the two ribs that you testified about yesterday, where did you find the adhesions?

A. They were posterior and back of the seat of the fracture.

Q. 107. Can you make it more clear by demonstrating to the jury about where the location of the fracture and the point where you found the adhesions?

A. The seat of the fracture as below and slightly back of the nipple line and around on the side of the chest, and the adhesions extended from the spine as far as the chest goes towards the spine and around three or four inches to the right so that it ——

Q. 168. Approximately in the case of this subject, what was the distance from the point of fracture to the closest point of the adhesions in inches?

A. Oh, probably about three inches.

Q. 169. And approximately, what was the distance from the point of fracture of the ribs to the place where the pus deposit was found?

A. Oh, somewhere around six inches from that point.

Q. 170. In what general direction?

A. Back.

Q. 171. Was it on about the same level or was it higher or lower?

A. It extended about as high as that; from that downward.

Q. 172. Are you speaking now of the adhesions or the pus deposits?

A. Of the entire trouble."

Also (Tr. 483) continuing with reference to what was found on the post mortem examination of Lewis Goodyear, witness said:

"Q. 182. Tell what you found in the parietal pleura at or near the point of the fracture of the ribs.

A. The pleura was smooth and normal over the place where the ribs had been fractured.

Q. 183. Was there any evidence or scar?

A. Not so far as the pleura was concerned; no.

Q. 184. If there had been a rupture of the pleura at any time, would such be evidenced by a scar or scarry tissues?

A. Sure; there would be a scar or adhesions or something of the sort to show.

Q. 185. Did you find any scars or adhesions there present?

A. No, sir.

Q. 186. Did you look particularly at that point?

A. I did; yes, sir.

Q. 187. Could you state, doctor, from your knowledge and experience as a physician and surgeon as to whether the adhesions which you found were of recent formation or of long standing?

A. Yes, sir.

Q. 188. What was your conclusion?

A. They were not very old.

Q. 189. Could you—are you able to express an opinion as to what time they may have existed?

A. Oh, probably just a week, several weeks; not over several weeks.

As an expert witness, Dr. MITCHELL further testified (Tr. 5389):

"Q. 147. You previously testified that you have heard most of the evidence in this case?

A. Yes, sir.

Q. 148. And you heard the testimony both of Doctor Munford and of Doctor Thomas?

A. Yes, sir.

Q. 149. And you know the evidence in the main testimony in relation to the autopy and the results stated to have been found there?

A. Yes, sir.

Q. 150. Do you recall the testimony in relation to pleurisy?

A. Yes, sir.

Q. 151. Now, from your experience as a physician and surgeon and in your—in your technical knowledge and from what you have heard testified and any other facts that may have been shown in the hypothetical question you have just answered, have you an opinion at this time as to whether or not Mr. Goodyear did in fact have pleurisy?

A. Yes, sir; I have an opinion.

Q. 152. What is your opinion?

A. My opinion and my conviction if that the only pleurisy Mr. Goodyear had, rather from the testimony as I have heard it, was in the right chest where the needle punctures were made.

Mr. Ward: We ask that the answer be stricken out as not responsive to the question.

The Court: Overruled.

Q. 153. What condition or conditions have been testified about causes you to be convinced and have that opinion?

A. The condition of the heart; the condition of the lungs; the fact that there was a reoccurrence of the fluid in the left

chest after he had was once been drawn out; that the record as I heard of the post-mortem indicated no inflammation or pleurisy in the left chest.

Q. 154. Now, if you do have pleurisy, is there inflammation?

A. Yes, sir.

Q. 155. There must be?

A. Yes, sir.

Q. 156. What about pain?

A. There is pain.

Q. 157. In case he didn't have it active at the beginning, if there was an extended pleuritic condition, state whether or not upon post-mortem the effect of the inflammation would be apparent?

A. Certainly would; yes, sir.

Q. 158. How would it be exhibited?

A. By the condition of the organ; the thickened condition of the pleura.

Q. 159. Would that be marked?

A. Yes, sir; and there are usually some soft adhesions in such a subject following after an inflammation; so in case of an inflamed pleura that would show a transudate, which passed from over there, the waterlogged lungs or oedematous condition in the pleural cavity.

Q. 160. Now, then, do I understand you correctly that in your opinion the source of the condition that was found in between the pleuras was the lung?

A. On the left side the source of it was the lung.

Q. 161. Now, again what about the right side?

A. On the right side fluid found there was probably the result of inflammation of the pleura caused by the needle punctures, one of which or more than one entered the lung in the dry tap and caused the leakage of this resulting in the oedematous condition or water-logged material in the pleura on the right side.

Q. 162. Is there any way that you could tell from what source as you have heard testified here, this condition on the right side?

A. Probably a needle puncture.

Q. 163. Do you mean either externally or internally?

A. It might be carried from the outside; it might through the puncturing of the lung from the lung tissue.

Q. 164. May the lung carry considerable infection and not give any outward sign of it?

A. Oh, yes.

Q. 165. Is that true of most of the organs of the body?

A. Yes, sir; I think so."

NOTE.—The dry tap referred to in Doctor Mitchell's testimony relates to the testimony of Dr. Munford (Tr. 282-3-4) where he testified that he aspirated or tapped the patient Goodyear with a needle April 12, 1920, and on occasions subsequent to that date, for the purpose of drawing off fluid, if any, from the chest cavity. His first tap was on the left side where he secured quite a quantity of fluid. There were no pus germs in this fluid. His treatment was for pleurisy and the heart. He found the condition on the right side growing worse (Tr. 286). He tapped the right side but did not find any fluid (Tr. 287).

Notice of appeal was served by this appellant March 16, 1925. (Abstract of Appellant 51).

Certificate

The foregoing is a true and correct counter abstract on cross appeal of appellee in the above entitled cause, so far as it is necessary to present the questions for review.

Luther Burns, J. E. DuMars, W. D. Vance, Attorneys for Appellant.

Specifications of Error

1. The court erred in refusing the admission of competent evidence offered by appellant at the trial.

2. The court erred in overruling appellant's motion for a new trial.

3. The court erred in rendering judgment in favor of appellee and against appellant.

Luther Burns, J. E. DuMars, W. D. Vance, Attorneys Appellant.

IN SUPREME COURT OF KANSAS

ORDER SUBSTITUTING ANDREW W. MELLON AS DIRECTOR GENERAL—Filed February 13, 1926

Now on this 13th day of February, 1926, upon representation having been made by Luther Burns, Attorney at Law and Attorney of Record in the above-entitled suit, that Andrew W. Mellon has succeeded to the office of Director General of Railroads and Agent of the President under Transportation Act 1920, and is at this time the duly qualified and acting Director General of Railroads and as such Agent.

It is hereby ordered that the said Andrew W. Mellon in his official capacity be substituted as appellant in the above-entitled suit and as judgment creditor therein.

[File endorsement omitted.]

Minute entry of argument and submission June 7, 1926, omitted in printing.

IN SUPREME COURT OF KANSAS

No. 26347

LUCISA GOODYEAR, as Admx., etc., Appellee,

vs.

JAMES C. DAVIS, Director General of Railroads, as Agent, Appellant

JUDGMENT—July 10, 1926

This cause comes on for decision and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court, taxed at $—, and hereof let execution issue.

IN SUPREME COURT OF KANSAS

No. 26,347

LOUISA GOODYEAR, as Administratrix, etc., Appellee,

v.

JAMES C. DAVIS, Director General of Railroads, as Agent, Appellant

OPINION—Filed July 10, 1926

Syllabus by the Court

1. Death—Right of Action—Federal Employers' Liability Act.—In an action under the federal employers' liability act, the proceedings considered and a previous decision in the same case (Goodyear v. Railway Co., 114 Kan. 557, 220 Pac. 282; 115 Kan. 29, 220 Pac. 1049) holding that "the federal employers' liability act creates a right of action in the injured employee for his suffering and loss resulting from the injury, and also creates a distinct and independent right of action in the personal representative of the deceased employee, in the event death results from the injury, for the benefit of certain designated defendants," followed and adhered to.

2. Same—Instructions.—And further, the record considered, and held: (a) The instructions fairly covered the issues; (b) it was not error to refuse certain requested instructions; (c) the instructions given were not improper.

3. Same—Trial Generally.—Various alleged errors considered and held not to require a reversal.

Appeal from Republic District Court, John C. Hogin, judge. Opinion Filed July 10, 1926. Affirmed.

Luther Burns, J. E. Du Mars, both of Topeka, and W. D. Vance, of Belleville, for the appellant.

N. J. Ward and John F. McClure, both of Belleville, for the appellee.

The opinion of the court was delivered by

Hopkins, J.:

The action was one by the administratrix to recover damages under the federal employers' liability act for the wrongful death of Lewis Goodyear and for personal injuries sustained by him. The case has been twice tried, and this is the second appeal. The first trial in May, 1922, resulted in a verdict and judgment for the defendant. On appeal the judgment was reversed. (Goodyear v. Railway Co., 114 Kan. 567, 220 Pac. 282; 115 Kan. 20, 220 Pac. 1049.) The facts are fully stated in the former opinion and need not be repeated. In a second trial of practically the same issues in the district court the jury returned a general verdict for plaintiff for $6,080 and answered special questions as follows:

"1. Was the defendant guilty of fraud in making settlement with Lewis Goodyear on March 12 and 16, 1920?

A. No.

"3. Was Lewis Goodyear mentally capable of transacting business on March 12 and 16, 1920?

A. Yes.

"5. Do you find there was mutual mistake, past or present, on the part of Lewis Goodyear and the defendant as to Goodyear's physical condition prior to and on March 12 and 16, 1920, at the times settlement was agreed upon and completed?

A. No.

"7. Was the release given under a mistaken belief, of Lewis Goodyear and a representative of the defendant, that the material results of the injuries received on July 31, 1919, had disappeared?

A. No.

"8. Do you allow anything for funeral expenses and burial?

A. No."

Both parties appeal.

The defendant contends that the questions involved in this appeal are so interwoven with the former appeal that the court should reconsider the entire question and overrule its former decision; that the trial court erred in re-

fusing to render judgment for it upon the special findings, and notwithstanding the general verdict, in refusing to give certain instructions and in the giving of others; that the instructions of which complaint is made are contrary to section 10 of article I of the constitution of the United States in that the same impair the obligation of the contract of settlement entered into between the defendant and Lewis Goodyear. It argues that this court in its former decision misinterpreted the decisions of the federal courts and misapplied the law of the facts. In the original decision it was held that:

"The federal employers' liability act (35 U. S. Stat. ch. 149, as amended by 36 U. S. Stat. ch. 143) creates a right of action in the injured employee for his suffering and loss resulting from the injury, and also creates a distinct and independent right of action in the personal representative of the deceased employee in the event death results from the injury, for the benefit of certain designated dependents.

"A settlement made by the injured employee after the injury and prior to his death, for his suffering and loss, is not a bar to the action by the personal representative for the benefit of dependents for the death, if it resulted from the injury.

"In an action under the federal employers' liability act by the personal representative for damages to the injured employee and for the death, the widow of the employee having been appointed administratrix, the fact that as the wife of the injured employee she was present at the time an agent of defendants made a settlement with him for his injuries would not estop her as personal representative of his estate from seeking to set aside the release because of his mental incapacity to execute it." (114 Kan. 557, 220 Pac. 282, syl.)

The defendant complains chiefly of instruction 8 given by the trial court, which reads:

"You are instructed that the federal employers' liability act, under which plaintiff's action was brought, creates two separate and distinct rights of action resulting from an injury such as complained of by the plaintiff in this case; one right of action to the injured employee for his suffer-

ing and loss resulting from the injury, and one to his personal representative for the benefit of his surviving widow and children, in the event death results from the injury. And you are instructed that the latter cause of action could not be released by the deceased Lewis Goodyear by any action taken by him. It accrues solely to his personal representative for the benefit of the persons named and Lewis Goodyear in his lifetime would have no control over same. In other words, it did not accrue until his death and hence he could not release it by any act on his part."

The instruction was in accordance with the views heretofore expressed by this court, and was not improper.

We have given consideration to the able argument of the defendant, but are of opinion our previous decision was correct.

The plaintiff contends that the trial court did not properly submit the question of mutual mistake to the jury; that under the undisputed evidence there was mutual mistake as a matter of law, since the jury found that the deceased died from injuries, and that the jury would not have found except for misdirection by the court. The accident occurred July 21, 1919. The settlement was agreed upon March 12, 1920, the money paid, and a release taken four days later. We are of the opinion the question of mutual mistake under all the circumstances was one of facts for the jury. The instructions to which plaintiff's objection is made reads:

"In order to find that there was a mutual mistake of parties in making the settlement plead by defendant and to justify you in setting aside the release made on March 16, 1920, you must find by clear, decided and satisfactory evidence that said release was executed under a mistake of both Lewis Goodyear and the defendant as to the extent of Goodyear's injuries.

"It is not enough that Goodyear executed the release under a mistaken belief as to the extent of his injuries, but both parties must have been honestly mistaken and the release executed because of such mistake. In other words, unless you find that both parties were acting under a misapprehension of the real condition of Lewis Goodyear or of the gravity of his injuries, then there would be no mutual mis-

take and the release should not be set aside for that reason. But if you find that both parties were acting under such mutual mistake, then such release should be set aside."

The contention is that the jury was confused by the instructions given in that the court did not direct attention to the fact that the mistake, if there was one, was between Lewis Goodyear and agent of the defendant (the doctor or claim agent who effected the settlement), but referred only to the defendant (James C. Davis). We do not regard this contention as sound. After a full trial of the case and elaborate instructions, the jury, in our opinion, could not have become confused as to the identity of the defendant and his agents. Complaint is made of the language of the instruction wherein the court told the jury it must find by "clear, decided and satisfactory evidence that the release was executed under a mistake." Considering all the circumstances, together with the general charge to the jury, the court, in our opinion, did not misstate the rule. Other matters argued at length in the briefs need not be discussed.

The judgment is affirmed.

IN SUPREME COURT OF KANSAS

PETITION FOR STAY OF MANDATE—Filed July 21, 1926

To the Honorable Supreme Court of Kansas:

Your petitioner, Andrew W. Mellon, Director General of Railroads, as Agent, respectfully represents to the Court:

1. That on July 10, 1926, an opinion of this Court was filed affirming the judgment of the District Court of Republic County, Kansas, in favor of the above named appellee and against the appellant, your petitioner herein, in a cause of action in which a federal question was involved, to wit, the construction of the Federal Employers' Liability Act.

2. That the main legal question presented in the case was whether or not under the Federal Employers' Liability Act a settlement made in good faith during the lifetime of

a deceased employee after an injury and prior to his death is a bar to an action by a personal representative for the benefit of dependents for the death, if it resulted from the injury, and that the questions presented by the assignments of error in said cause are of broad general interest to railroad companies throughout the United States; and your petitioner is advised by counsel that it is desirable that the Supreme Court of the United States be asked to pass finally upon the questions involved in order that the managing officers of railroad companies be advised as to the proper disposition of similar cases arising in the future.

3. That the act of Congress and the rules of the United States Supreme Court fix the time within which petitions for writ of certiorari may be filed at three months; it is further provided by Rule 35 of the United States Supreme Court that the party making application for writ of certiorari shall, as a part thereof, furnish the Court with thirty copies of a printed record and forty printed copies of the petition for the writ of certiorari and brief in support thereof, and that notice of the filing of the petition, together with a copy thereof and a copy of the printed record and supporting brief, shall be served on counsel for the respondent within ten days after the filing, and due proof of service shall be filed with the clerk of said court.

4. Your petitioner is preparing to perfect the record in this case and to file its petition for writ of certiorari in the Supreme Court of the United States, with supporting brief, on or before the tenth day of October, 1926.

5. Your petitioner is advised that in order that the proceedings may remain in their present status pending the disposition of such a petition for writ of certiorari, a special order of this Court is required to stay the issuing of the mandate.

Wherefore your petitioner prays that this Court enter an order directing the clerk thereof to hold the mandate in this cause pending the filing of the aforesaid petition for a writ of certiorari in the Supreme Court of the United States until the tenth day of October, 1926, and that if said petition shall be filed in the Supreme Court of the United States on or before that day, the mandate be further held

until the Supreme Court of the United States shall act upon said petition for a writ of certiorari.

Andrew W. Mellon, Director General of Railroads, as Agent, by Luther Burns, J. E. Du Mars, W. D. Vance, Attorneys for Petitioner and Appellant.

In Supreme Court of Kansas

Order of Stay—Filed July 21, 1926

Now on this 21st day of July, A. D. 1926, upon consideration of the foregoing petition and upon motion of Luther Burns, Attorney for said petitioner and appellant, it is ordered that the mandate in the above entitled case shall not issue, but shall be stayed until October 10, 1926, and that if on or before that day there shall be filed with the clerk of this court an affidavit of counsel for said petitioner and appellant showing that a petition for writ of certiorari has been filed by said petitioner and appellant in the Supreme Court of the United States, the mandate shall be held for a further period thereafter and shall not issue before final disposition shall be made by the Supreme Court of the United States of the petition for a writ of certiorari aforesaid.

[File endorsement omitted.]

In Supreme Court of Kansas

Minute Entry of Order Denying Petition for Rehearing

Be it further remembered that on the 25th day of July, 1926, the appellee, Louisa Goodyear, as Administratrix of the Estate of Lewis Goodyear, deceased, filed a petition for rehearing on cross appeal, which was denied on September 11, 1926, said petition for rehearing being in words and figures as follows, to wit:

Petition for rehearing, covering three pages, filed July 25, 1926, omitted from this print. It was denied and nothing more by order September 11, 1926.

In Supreme Court of Kansas

Order of Substitution—September 21, 1926

Now on this 21st day of September, 1926, upon representation of N. J. Ward, Attorney of Record of Appellee, and Luther Burns, Attorney for Appellant, that Louisa Goodyear has departed this life since the affirmance of the judgment herein on July 10, 1926, and that Edward Goodyear has been duly appointed Administrator of the Estate of Lewis Goodyear, deceased, to succeed the said Louisa Goodyear,

It is hereby ordered that Edward Goodyear, as Administrator of the Estate of Lewis Goodyear, Deceased, be substituted as appellee in the above entitled action and as judgment creditor therein.

W. A. Johnston, Chief Justice.

Clerk's certificate to foregoing transcript omitted in printing.

Supreme Court of the United States

Order Allowing Certiorari—Filed November 25, 1926

The petition herein for a writ of certiorari to the Supreme Court of the State of Kansas is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 32,229. Kansas Supreme Court. Term No. 662. Andrew W. Mellon, Director General of Railroads and Agent of the President under Transportation Act, 1920, petitioner, vs. Edward Goodyear, as administrator of the estate of Lewis Goodyear, deceased. Petition for writ of certiorari and exhibit thereto. Filed October 1st, 1926. File No. 32,229.